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No. ——

IN THE

Supreme Court of the United States

RICHARD M. DALEY, *et al.*,
Petitioners,

v.

CLUB MISTY, INC.,
doing business as TEQUILA ROADHOUSE, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a referendum procedure that allows voters of a precinct to decide if liquor should continue to be sold at a particular address in their precinct deprives liquor licensees of property without due process.

PARTIES TO THE PROCEEDING

The petitioners are Richard M. Daley, Mayor and ex officio Commissioner of the Liquor Control Commission of the City of Chicago; James Laski, Clerk of the City of Chicago; the Board of Election Commissioners of the City of Chicago; and the City of Chicago. The State of Illinois Liquor Control Commission was named as a defendant in one of the two consolidated cases, but advised the district court that it would not participate in the case and is not a petitioner in this Court. The respondents are Club Misty, Inc., d/b/a Tequila Roadhouse; and Alberto Bedoya, d/b/a Casanova's, Inc.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners, Richard M. Daley, *et al.*, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals, App., *infra*, at 1a-20a, is reported at 208 F.3d 615 (7th Cir. 2000). The district court's opinion, App., *infra*, at 21a-58a, is reported at 37 F. Supp. 2d 1056 (N.D. Ill. 1999).

JURISDICTION

The judgment of the court of appeals was entered on April 3, 2000. A timely petition for rehearing was denied on May 25,

2000. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1)(1994).

STATUTES INVOLVED

Section 9-2 of the Illinois Liquor Control Act, 235 ILCS 5/9-2 (1998), is set out at App., *infra*, at 64a-67a. Sections 9-10 and 9-11, 235 ILCS 5/9-10, 9-11 (1998), providing additional referendum procedures, are set out at App., *infra*, at 67a-70a.

STATEMENT

The Illinois Liquor Control Act expressly provides that "[a] license shall be purely a personal privilege, good for not to exceed one year after issuance, . . . and shall not constitute property . . . ." 235 ILCS 5/6-1 (1998). One means by which the Act authorizes termination of licenses is by referendum under section 9-2, which provides that upon a petition signed by not less than 40% of the registered voters in any precinct of Chicago, a referendum shall be placed upon the ballot at the next election asking whether the sale at retail of alcoholic beverages shall be prohibited at a particular address. *Id.* 5/9-2. If a referendum passes, the voters may, also by referendum, remove the prohibition, but they may not place such a proposal on the ballot for 47 months after passing the prohibition. See *id.* 5/9-10 & 5/9-11.[1] The Liquor Control Act also allows voters to vote their entire precinct dry; to place such a referendum on the ballot requires only 25% of the signatures of the registered voters in the precinct. See *id.* 5/9-2.

Respondents, Club Misty, Inc., d/b/a Tequila Roadhouse ("Club Misty"); and Alberto Bedoya, d/b/a Casanova's, Inc. ("Casanova's"), each filed complaints for declaratory and injunctive relief challenging the constitutionality of the referendum procedure authorized by section 9-2. Signatures

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[1] This single-address referendum option was added to the Act in 1994, replacing a prior provision that permitted referenda targeted at a single establishment rather than a single address. The single-establishment referendum option was invalidated in *87 South Rothschild Liquor Mart v. Kozubowski*, 752 F. Supp. 839 (N.D. Ill. 1990).

were collected in November 1998 from 209 of Club Misty's neighbors, which was at least 40% of the voters registered in the precinct, for a referendum to prohibit the sale of liquor at Club Misty's address, and the measure was certified for submission to voters in a February 1999 election. Club Misty filed suit on December 15, 1998, alleging that the referendum procedure constituted both a due process violation and a bill of attainder. The referendum later passed by at least a majority vote.

A referendum to prohibit the sale of liquor at Casanova's address was placed on the November 1998 ballot, again upon the signatures of at least 40% of its neighbors. This measure also passed, by a vote of 176 to 52. Casanova's filed suit on December 11, 1998, but alleged only a due process violation.

The district court concluded that section 9-2's single address referendum procedure did not offend due process because a liquor license is not property within the meaning of the Due Process Clause, and that section 9-2 was not a bill of attainder. See App., *infra*, at 21a-58a. A divided panel of the Seventh Circuit reversed. While rejecting Club Misty's bill of attainder argument, see App., *infra*, at 2a-4a, the majority held both that a liquor license is property protected by the Due Process Clause, *id.* at 6a, and that the referendum procedure was "ineffectual to destroy constitutional property," *id.* at 7a. Judge Bauer dissented, noting that "[w]hen Illinois exercised its right to control (or ban altogether) the sale of liquor, it opted to create a system of local-option rules," and that in Chicago, that option was conferred by precinct. *Id.* at 15a. And within that precinct, voters could exercise their franchise as they saw fit.

> [S]uch is the price of democracy; the voters may make a choice that their betters may not approve .... The process of democratic government does not rely on stern lectures from the highly educated. The least of us has the right to express himself or herself in the ballot box without deference to the ruling classes.

Id. at 18a.

The City's petition for rehearing en banc was denied, with Judges Bauer and Kanne voting to grant the petition.

REASONS FOR GRANTING THE PETITION

A divided panel of the Seventh Circuit has held that an Illinois statute allowing voters in Chicago to vote an individual liquor license void is unconstitutional, and in so holding has repudiated the conclusion that the Illinois courts have reached about whether a license is property within the meaning of the Due Process Clause. This unseemly conflict alone merits this Court's review. But beyond that, the court of appeals' decision also deprives communities of a crucial mechanism to protect the quality of life in their neighborhoods. Targeted referenda that determine where liquor may and may not be sold enable the community to control its own destiny, and are a critical tool for stabilizing troubled communities.

There is an urgent need for guidance from this Court in this area of the law. Across the country, the state and federal courts are at a loss to decide when a liquor license is property within the meaning of the Due Process Clause. The decisions present marked conflict, with state courts (and state legislatures) generally attempting—in vain—to insist on the States' power under the Twenty-First Amendment, and federal courts rather routinely casting aside the limits that the States have chosen to impose on the privilege of selling liquor. But the federal courts themselves struggle with whether discretion in the licensing process means that a license is not property in the constitutional sense; the decision below recognizes a property interest in a liquor license under a regulatory scheme that would not create a property interest in either the Eighth or Tenth Circuits. Thus, there is a conflict among the circuits, and between other state and federal courts, as well as between the state and federal courts in Illinois. Before this unseemly and important conflict is permitted to stand, or create more friction between the federal courts and the state courts and legislatures, this issue should be settled by this Court.

In addition to the uncertainty and outright conflict in this area—which alone meant that the Illinois General Assembly, for example, could not rely on a settled line of decisions of the courts of its state going back nearly a century—the decision below should be reviewed because it deprives state and local governments of an important option for regulating the sale of liquor. The disproportionately large number of liquor outlets in the inner city measurably contributes to a higher crime rate, especially homicide, physical violence, drug dealing, graffiti, loitering, and prostitution. The targeted referendum at issue in this case addresses the problems presented by the sale of liquor at a particular location in a more focused, effective, and prompt way than any other means yet developed. And it empowers the very communities most directly affected by these establishments, and most knowledgeable about their effects on the stability of the surrounding neighborhood. If this important regulatory device may not be used, that ruling should come from this Court.

Review by this Court will disclose, moreover, that the result reached by the Seventh Circuit's majority is not faithful to this Court's decisions. Under a referendum procedure, liquor licensees hold their licenses at the pleasure of the electorate, as the state statute at issue makes clear. Thus, licensees have no vested rights sufficient to create a property interest. The Seventh Circuit was wrong in concluding otherwise, and that error amply justifies review by this Court.

1. The court of appeals' majority acknowledged not only that the Illinois General Assembly has declared by statute that liquor licenses convey no vested right, but also that a long line of decisions of the Illinois Appellate Court have held that a liquor license is not "property" for purposes of the Due Process Clause. See App., *infra*, at 5a (citing *Blue Cat Lounge, Inc. v. License Appeal Commission*, 667 N.E.2d 554, 557 (Ill. App. Ct. 1996); *Ole, Ole, Inc. v. Kozubowski*, 543 N.E.2d 178, 181-82 (Ill. App. Ct. 1989); *Ross v. Kozubowski*, 538 N.E.2d 623, 626

(Ill. App. Ct. 1989); *Black Knight Restaurant, Inc. v. City of Oak Forest*, 513 N.E.2d 109, 111 (Ill. App. Ct. 1987)). As the Illinois Appellate Court explained in *Ross*, "[f]or more than 80 years, the courts of this State have . . . steadfastly held that a license to sell alcoholic beverages is not a right, but rather, a privilege, subject to regulation under the police powers of the State, and that, as such, it is not afforded due process protection." 543 N.E.2d at 181. Indeed, the principle that liquor licenses are not property for constitutional purposes because they can be terminated by referendum was first established by the Illinois Supreme Court in *People v. McBride*, 84 N.E. 865, 872-73 (Ill. 1908).

Unfortunately, the decision below is not the first time that the state and federal courts have come to opposite conclusions about whether the discretion inherent in a state referendum procedure means that liquor licensees have no constitutionally protected property interest. The Sixth Circuit struck down an Ohio statute also providing for targeted referenda in *Brookpark Entertainment, Inc. v. Taft*, 951 F.2d 710 (6th Cir. 1991), cert. denied, 506 U.S. 820 (1992), although the Ohio courts had long held that a license is not property, see, *e.g.*, *State ex rel. Zugravu v. O'Brien*, 196 N.E. 664 (Ohio 1935). The district court in New Jersey, similarly, broke ranks with numerous New Jersey Supreme Court opinions and ignored a very clear statute indicating that "[u]nder no circumstances . . . shall a license, or rights thereunder, be deemed property"; that federal court held that a referendum reducing the hours of operation of taverns by two hours a day deprived licensees of property within the meaning of the Due Process Clause. *Sea Girt Restaurant & Tavern Association, Inc. v. Borough of Sea Girt*, 625 F. Supp. 1482 (D.N.J.), aff'd mem., 802 F.2d 448 (3d Cir. 1986).[2] And the district court in Georgia held that even applicants for liquor licenses have a protectable property interest merely because

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[2] The court did uphold the referendum process, finding that it provided due process. See 625 F. Supp. at 1489-91.

state law requires municipalities to "set forth ascertainable standards" to govern the issuance of a license, even though the state statute clearly provides that each "local governing authority is given discretionary powers within the guidelines of due process set forth in this Code section as to the granting . . . of the . . . license." See *McCollum v. City of Powder Springs*, 720 F. Supp. 985, 989 (N.D. Ga. 1989).

This disarray simply reflects the broader problem emerging from the States' exercise of their local prerogative under the Twenty-First Amendment to make their own choices about how to regulate liquor. There is considerable uncertainty about how to reconcile discretion in the licensing process with the notion of a property interest in the license within the meaning of the Due Process Clause. Even though many States create highly discretionary licensing systems, they are frequently told that they have unintentionally created a property interest—and thus must now provide the full array of procedural due process protections. As one commentator discusses at length, "[s]tates differ widely, even within their own boundaries, as to whether a liquor license is treated as property for all purposes." Shelley Ross Saxer, *License to Sell: Constitutional Protection Against State or Local Government Regulation of Liquor Licensing*, 22 Hastings Const. L.Q. 441, 452 (1995). For this reason as well, the decision below, with its nationwide implications, amply merits this Court's review.

2. The need for this Court's intervention is not confined to the conflict between the state and federal courts on whether liquor licenses are property. The federal courts of appeals are themselves in conflict about how to evaluate the role of discretion in the licensing process. The approach taken in the decision below, as well as in the Sixth Circuit's decision in *Brookpark Entertainment*, is inconsistent with decisions of the Eighth and Tenth Circuits.

In *Federal Lands Legal Consortium v. United States*, 195 F.3d 1190 (10th Cir. 1999), the court considered a claim by

holders of federal grazing permits ("the FLLC") asserting a property interest in those permits. Some of these permits were changed when they were renewed to limit the amount of forage cattle could consume, and some were changed after they were renewed. The court noted federal pronouncements stating that such permits do not convey "any right, title, interest, or estate in the public lands or resources" and were thus mere licenses to use federal land, not vested rights in that land. See *id.* at 1196. Where the government "has not explicitly created a property right in a permit, we ordinarily look to the degree to which the federal government has restrained its own discretion relating to that permit." *Id.* at 1197. And because "Congress expressly allowed the Forest Service to alter the terms and conditions of the permits after the completion of [an environmental] analysis, FLLC cannot successfully premise a legitimate claim of entitlement to the terms and conditions of the permits as issued." *Id.* at 1201.

Similarly, the court in *Movers Warehouse, Inc. v. City of Little Canada*, 71 F.3d 716 (8th Cir. 1995), considered a challenge to the state's refusal to renew a bingo hall license. Under Minnesota law, an applicant for a state bingo license must submit with the application a resolution of approval from the municipal authority. At the time, Little Canada had an ordinance allowing only one bingo hall to operate at a time. Although Movers Warehouse had obtained the city's approval for renewal of its state bingo hall license for several years, in 1993, the city did not approve Movers Warehouse's application and instead approved an application from another operator. The court rejected a claim of property interest in the state license because it was dependent on the city's approval, and, by ordinance, the city could refuse to issue, renew, or revoke a license "for any reason." Even though the applicant was otherwise entitled to renewal of its state license, the municipality's "unfettered discretion" to block renewal of the license meant that Movers Warehouse had "failed to show that

its expectation of renewal of its state license rose to the level of a property interest created by state law." *Id.* at 719.

Both of these cases reason that where the set of laws governing a license confers specified entitlements on the licensee but also complete discretion on someone—whether the licensing authority itself or another entity—to alter or eliminate those entitlements, the licensee holds nothing amounting to a property interest. Here, of course, Illinois has chosen to confer that discretion on the voters of a precinct to decide whether to suffer the sale of liquor at a particular address. As the court of appeals itself acknowledged, there are no standards to guide such a decision. See App., *infra*, at 8a-11a. But while the Sixth Circuit in *Brookpark* and the Seventh Circuit in the decision below have concluded that a wholly discretionary process for voiding a liquor license does not deprive that license of the attributes of "property" for constitutional purposes, that view cannot be reconciled with the law in the Eighth and Tenth Circuits.

The uncertainty in this area should be ended. State legislatures are entitled to clear rules about what types of regulatory schemes require individualized notice and opportunity for hearing. Here, the Illinois General Assembly relied on a settled view of constitutional requirements articulated by its state courts, only to find its handiwork invalidated by the federal courts. And other States considering measures that empower local communities through referenda will necessarily find it difficult to evaluate the constitutionality of those measures, given the disarray in the law. In the face of such uncertainty, and the risk of large money damages awards against local licensing officials if they close a licensed business in reliance on a referendum later held unconstitutional, innovation will be stifled. Thus, this Court's review is amply warranted.

3. The decision below also misapplies this Court's precedents concerning the character of a "property" interest

entitled to protection under the Due Process Clause. Constitutionally protected entitlements "are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972); accord, *e.g.*, *Bishop v. Wood*, 426 U.S. 341, 344 & n.7 (1976). To have a protected property interest in a particular benefit, such as a liquor license, state law must accordingly confer more than "a unilateral expectation"; only a "legitimate claim of entitlement" invokes due process protections. *Roth*, 408 U.S. at 577. Thus, in *Roth* this Court held that a public employer's refusal to renew a teacher's contract at its termination infringed no property interest of the teacher, who had "no possible claim of entitlement to reemployment." *Id.* at 578.

A referendum law like the one at issue here similarly defeats a claim of property interest. Under section 9-2, the rights conferred by a liquor license include no legitimate claim of entitlement to retention of the license; at any election, the voters exercise unfettered discretion to place on the ballot a referendum asking whether a licensee's premises should be voted dry. The statute at issue here could not be clearer on this point. Section 9-2 of the Liquor Control Act explicitly empowers the voters in any Chicago precinct to vote a single address dry. See 235 ILCS 5/9-2 (1998). And if the voters do, the liquor license for any establishment at the street address "shall be void." *Id.* Because licenses are held at the pleasure of the electorate, they confer no entitlement that amounts to a protected property interest.

The court of appeals nevertheless found that the statute conferred a property interest on liquor licensees. Relying on its prior decision in *Reed v. Village of Shorewood*, 704 F.2d 943 (7th Cir. 1983), the majority observed that a number of rights are conferred on a liquor licensee prior to the point that the

license can be voided by referendum—in particular, the rights to have a license renewed absent a finding that the licensee is unqualified, or the premises unsuitable, for a liquor license, as well as the right to retain the license during its term unless it is revoked or suspended for cause after a hearing. See App., *infra*, at 1a-2a, 4a-6a.[3] The court of appeals then concluded that section 9-2 did not deprive liquor licenses of their status as property because "[i]t creates no new substantive criteria for the grant or withdrawal of Illinois liquor licenses" and, in particular, did not "alter the 'for cause' condition [for license revocation] that makes those licenses property within the meaning of the due process clause." App., *infra*, at 7a. But this observation misses the point. The reason section 9-2 "creates no new substantive criteria" for the withdrawal of a license is that it creates a mechanism for the termination of the license without application of any substantive criteria—namely, the unfettered discretion of the voters to void any license they choose. Section 9-2 is thus the antithesis of "substantive criteria" for withdrawal of a license. And that, of course, is precisely why licensees lack any entitlement under Illinois law sufficient to support a due process claim. A license held only at the voters' complete discretion is simply not securely held.

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[3] In *Reed*, the Seventh Circuit had held that the refusal to renew a liquor license issued under Illinois law was a deprivation of property within the meaning of the Due Process Clause. See 704 F.2d at 948-49. This holding lacked practical significance, however, because the Illinois Appellate Court had already construed state law to require a hearing when a licensing authority decided not to renew a liquor license. See *City of Wyoming v. Liquor Control Commission*, 362 N.E.2d 1280 (Ill. App. Ct. 1977). Moreover, the authority of *Reed* was quickly questioned by the Seventh Circuit itself, which observed, in a decision the following year, that *Reed* had not considered the voters' discretionary authority to void liquor licenses by referendum, and that, by virtue of this broad power, it might well be that a referendum infringes no constitutionally protected property interest. See *Philly's v. Byrne*, 732 F.2d 87, 90-91 (7th Cir. 1984). See also App., *infra*, at 6a-7a.

The Seventh Circuit's holding, accordingly, is inconsistent with this Court's opinion in *Roth*, which points out that when state law grants entitlements during a specific term, if those entitlements must be renewed periodically, then a failure to grant renewal does not work a deprivation of property. Whatever entitlement licensees may have under Illinois law between elections, they have no entitlement to keep their license should the electorate decide to exercise its right to vote the license void.[4]

Moreover, the decision in *Roth* should make plain why the discord between the state and federal courts on the question whether a liquor license confers a property interest within the meaning of the Due Process Clause should be especially troubling. As *Roth* makes clear, the question whether a statutorily conferred interest is a sufficiently secure entitlement to amount to property in the constitutional sense turns on state law. For this reason, federal courts should be especially reluctant to reject the conclusion of the state legislators and state courts in this area. That is yet another basis on which to question the approach of the Seventh Circuit is this case, as well as the approach of the Sixth Circuit in *Brookpark Entertainment*, and it makes the conflict between the state and federal courts on this point all the more unseemly.

4. Beyond the need for guidance in this area of the law, the court of appeals' decision in this case poses serious problems

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[4] This point explains why *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985), the only decision of this Court the court of appeals' majority cited in support of its holding on this point, is inapposite. In that case, under applicable state law, public school teachers had a right to retain their tenured positions absent a finding of cause for discharge, and for that reason, this Court held that they enjoyed a "property" interest in their positions for constitutional purposes, despite their lack of a right to formal notice and opportunity to be heard prior to discharge. See *id.* at 538-41. Here, however, applicable state law grants licensees no protection from the voters' unfettered discretion to void a liquor license.

for municipalities struggling to address the problems associated with the sale of alcoholic beverages. By invalidating this provision of the Liquor Control Act, the court has deprived municipalities of an important community-driven mechanism to regulate the sale of liquor—and thereby safeguard the health, safety, and welfare of their neighborhoods. The community voice is the one that controls the referendum process, and it will often be the best judge of the local impact of an establishment that sells liquor. As Judge Bauer so powerfully remarked in his dissent, neighborhoods and communities "have no recognized political existence," but "it is there that Chicagoans live, marry, raise families, socialize and die . . . . Stability of neighborhood and safety are their primary objectives." App., *infra,* at 14a. Judge Bauer recognized that the "precinct" is the neighborhood's "closest parallel"—it in a sense gives political existence to the neighborhood. *Id.* at 15a. And because of the need for local control of neighborhoods, especially in a city the size of Chicago, the Illinois legislature empowered precincts to make their own decisions about the health, safety, and welfare of their communities. See *ibid.* This is a classic instance of the State's exercise of its traditional police power "to prohibit the sale of alcoholic liquor in inappropriate locations." *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 515 (1996). This procedure also creates an entirely healthy incentive for licensees to avoid externalizing the costs associated with their operation onto the surrounding community.

Such policy decisions by state legislatures should not be lightly cast aside. There is a statistical relationship between the number of liquor outlets and a variety of ills especially prevalent in the inner city: a higher crime rate, including homicide and physical injury; drug dealing, graffiti, loitering, and prostitution; divorce, child abuse, and domestic violence. See Shelley Ross Saxer, *"Down With Demon Drink!": Strategies for Resolving Liquor Outlet Overconcentration in Urban Areas*, 35 Santa Clara L. Rev. 123, 124 (1994). See also Shelley Ross Saxer, *License to Sell, supra*, at 444 n.10 ("high

correlation between the number of liquor stores and a neighborhood's crime rate"; "liquor contributes to 80% of the homicides and 60% of the injuries in African-American and Hispanic dominated inner-cities"; "[i]n roughly one-half to two-thirds of homicides and serious assaults, alcohol is found in the perpetrator or victim, or both") (citations omitted). But as it happens, the relationship between taverns and crime is a highly individualized one. As a comprehensive analysis of crime patterns in Chicago demonstrates, only certain establishments create crime problems for the surrounding community. See Richard L. Block & Carolyn Rebecca Block, *Space, Place and Crime: Hot Spot Areas and Hot Places of Liquor-Related Crime*, in Crime and Place: Crime Prevention Studies 149-76 (John E. Eck & David Weisburd eds., 1995). The referendum process gives the affected community the ability to address these problem establishments; and, by empowering the community, such measures ultimately strengthen the hand of those fighting to stabilize troubled neighborhoods.

In essence, a targeted referendum is an aspect of zoning, which "may indeed be the most essential function performed by local government, for it is one of the primary means by which we protect that sometimes difficult to define concept of quality of life." *Village of Belle Terre v. Boraas*, 416 U.S. 1, 13 (1974) (Marshall, J., dissenting). The "city's interest in attempting to preserve the quality of urban life is one that must be accorded high respect. Moreover, the city must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems." *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 71 (1976). And the referendum is doubly powerful because it not only protects quality of life but does so at the behest of, and according to the standards of, the community itself. Indeed, the referendum device is likely used to settle issues of liquor regulation more than any other, and for more than 100 years. See, *e.g.*, *Ohio ex rel. Lloyd v. Dollison*, 194 U.S. 445 (1904) (local option prohibiting sale of liquor); *Rippey v. Texas*, 193 U.S. 504 (1904) (same); *Sea Girt Restaurant*, 625 F. Supp. at

1484 (referendum regarding hours of liquor sales); *Rutherford Lodge No. 547, B.P.O.E. v. Hock*, 63 A.2d 893 (N.J. Super. A.D. 1949) (referendum regarding sales of alcoholic beverages for on-premises consumption under certain club licenses); *Walinski v. Mayor and Council of City of Gloucester*, 95 A.2d 625 (N.J. Super. Ct. 1953) (referendum regarding sale of liquor on Sundays); *Thompson v. McKinley County*, 816 P.2d 494 (N.M. 1991) (local option prohibiting sale of liquor from drive-up windows); *Jellico v. Conner*, 65 S.E. 725 (S.C. 1909) (local option to determine whether dispensaries closed in certain counties should be reopened); *Taylor v. Armentrout*, 632 S.W.2d 107 (Tenn. 1981) (referendum regarding sale of liquor for on-premises consumption).

The panel majority seemed to think that license revocation adequately protected the community's interest, but it should be easy to grasp the defects in the revocation process from the community's perspective. The community must first convince local prosecutors to devote the resources to building a case for revocation in light of the many competing priorities that such officials face. Even if a case is brought and succeeds at the local level, it is ultimately reviewed by regulatory officials not directly accountable to the residents of an affected community. In Illinois, as in most States, a local decision to revoke a license may be set aside by a state agency, the majority of whose members are appointed by the Governor. Thus, communities are forced to depend on the judgment of persons far removed from the concerns associated with the establishment in question, and who are not only unaccountable to the residents living in the affected neighborhoods, but far more likely to be influenced by the liquor lobby than the welfare of individual neighborhoods.[5]

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[5] The upshot of the panel decision is especially problematic since voters determined to close a particular establishment are left only with the option of voting their entire precinct dry—a procedure upheld in this circuit, see *Philly's*, 732 F.2d at 90. If the community is forced to implement its will by voting the entire precinct dry, the result can only be unduly harsh for other licensees in the precinct who have posed no concerns at all to their

On these questions of policy, the panel majority's primary concern was that a vote by an establishment's neighbors to determine the continued validity of its liquor license would constitute an "electoral free-for-all" that "might result in serious errors that a due process hearing would avert." App., *infra*, at 10a. Of course, as Judge Bauer pointed out,

> such is the price of democracy; the voters may make a choice that their betters may not approve .... The process of democratic government does not rely on stern lectures from the highly educated. The least of us has the right to express himself or herself in the ballot box without deference to the ruling classes.

Id. at 18a.[6]

To be sure, in this case the General Assembly did not confer unfettered discretion on licensing officials to revoke licenses,

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neighbors, but simply have the bad luck to be in a precinct with one problematic address. If the concern is due process, that result cannot possibly be preferred. A licensee that is disturbing its community should at least expect to be voted dry; a licensee that is the neighbor of that licensee should have no such expectations. As Judge Bauer remarked, the single-address local option allows "businesses which have decent regard for the preservation of the community standards [to] remain and their property rights not [be] scuttled by a bad apple in the liquor dispensing barrel." App., *infra*, at 17a.

[6] If the petition is granted we will also urge our submission—embraced by Judge Bauer in dissent—that even if a liquor license should be treated as property, then the referendum supplies licenses due process. Because the licensing issue in this case is a zoning decision, it may be made by referendum even when only a single parcel is involved. See, *e.g.*, *City of Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668, 679 (1976); *Southern Alameda Spanish Speaking Organization v. Union City*, 424 F.2d 291, 294 (9th Cir. 1970); *Taylor Properties, Inc. v. Union County*, 583 N.W.2d 638, 643 (S.D. 1998); *Florida Land Co. v. City of Winter Springs*, 427 So. 2d 170, 174 (Fla. 1983). And the California Supreme Court has extended this rule to cases in which the parcel's owner is deprived of a use to which it was previously entitled. See *Arnel Development Co. v. City of Costa Mesa*, 620 P.2d 565 (Cal. 1980). The panel's holding is in conflict with this decision. See App., *infra*, at 11a-13a.

and thus did not subject licensees to the whim of those regulators. Instead, the legislature required licensees to keep their communities satisfied according to neighborhood standards, aspirations, and needs. This country's history of liquor regulation by referendum should preclude any suggestion that the Constitution forbids requiring a licensee to be a good neighbor.[7]

In sum, the panel majority's decision has announced a new property right in Illinois, in conflict with a line of decisions of the state courts, and then relied on that new-found right to invalidate a critical provision of the Liquor Control Act, enacted because the Illinois General Assembly determined that the license revocation process is insufficient to protect the public health, safety, and welfare of communities where liquor is sold. This decision also conflicts with decisions in the Eighth and Tenth Circuits, and displays an unfortunately typical reaction by federal courts to the States' attempts to limit the entitlements flowing from liquor licenses. Now, more than ever, such activism in matters of liquor is intolerable; governments and residents alike need these community-driven tools, especially in the inner cities. For these reasons, the Court should grant the petition for certiorari.

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[7] In any event, if a licensee can establish that the voters voided its license based on arbitrary or invidious reasons, relief will be available under the Equal Protection Clause. See generally *Village of Willowbrook v. Olech*, 120 S. Ct. 1073, 1074-75 (2000) (per curiam) (irrational denial of municipal services to an individual applicant is actionable).

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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August 18, 2000

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 99-1597 and 99-1628

CLUB MISTY, INC., doing business as
TEQUILA ROADHOUSE, *et al.*,
Plaintiffs-Appellants,

v.

JAMES LASKI, CLERK OF THE CITY OF CHICAGO, *et al.*,
Defendants-Appellees.

Appeals from the United States District Court for the
Northern District of Illinois, Eastern Division.
Nos. 98 C 7831 & 98 C 8054—Charles R. Norgle, Sr., *Judge*.

Argued February 18, 2000
Decided April 3, 2000

Before POSNER, *Chief Judge*, and BAUER and MANION, *Circuit Judges*.

POSNER, *Chief Judge*. Two licensed taverns in Chicago appeal from the district court's dismissal of their suit to enjoin an Illinois state statute pursuant to which the plaintiffs would have lost their licenses had they not been granted preliminary relief that continues on appeal. The statute, 235 ILCS 5/9-1 *et seq.*, is challenged both as depriving the plaintiffs of their property without due process of law and as a bill of attainder.

Illinois liquor licenses are revocable only for good cause during the one-year term of the license and renewable as a matter of right when the term expires unless the licensee is unqualified or his premises unsuitable. 235 ILCS 5/3-14, 5/5-

2, 5/6-1, 5/7-5. (A tavern must have a local license as well, see 235 ILCS 5/3-14, 5/7-6; Chi. Munic. Code §§ 4-60-20(a), 60(a), but the parties make nothing of this, so we won't either.) There is no suggestion that either plaintiff gave cause to have its license revoked or not renewed. Each simply lost a vote by the residents of the precinct in which its tavern is located. The vote was authorized by 235 ILCS 5/9-2, which provides that if 40 percent of the registered voters in a precinct petition the board of elections for a vote on whether to prohibit the sale of liquor at a particular street address, the question shall be put to the precinct electorate at the next election and if a majority votes in favor of the prohibition the license of the establishment located at that address shall become void thirty days after the election. 235 ILCS 5/9-3. The record is silent on why these particular taverns incurred the voters' wrath; neither the petitioners nor the voters are required to give reasons. All we know, besides that the plaintiffs' taverns were duly licensed, is that in each precinct there are other liquor licensees who have not been voted out.

On the view we take of the case, we shall not have to decide whether the statute is a bill of attainder, U.S. Const., art. I, § 10, cl. 1; but we shall not conceal our skepticism that it is. A bill of attainder is a legislative punishment, and we may assume without having to decide both that a legislative delegation to the electorate of a standardless authority to punish would fall afoul of the prohibition of bills of attainder by constituting the electorate a surrogate legislature engaged in administering punishment, see *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 144 (1951) (concurring opinion); *Dehainaut v. Pena*, 32 F.3d 1066, 1070-71 (7th Cir. 1994); Laurence H. Tribe, *American Constitutional Law* § 10-6, pp. 660-61 (2d ed. 1988); cf. *Citizens Against Rent Control/Coalition for Fair Housing v. City of Berkeley*, 454 U.S. 290, 295 (1981), and that corporations as well as individuals are protected by the constitutional prohibition. See *Plaut v.*

Spendthrift Farm, Inc., 514 U.S. 211, 239 n. 9 (1995); *BellSouth Corporation v. FCC*, 144 F.3d 58, 63 (D.C. Cir. 1998); *BellSouth Corporation v. FCC*, 162 F.3d 678, 684 (D.C. Cir. 1998); *SBC Communications, Inc. v. FCC*, 154 F.3d 226, 234 and n. 11 (5th Cir. 1998). Even so, it is doubtful that what the voters have voted to do to the plaintiffs can be regarded as punishment.

The requirement of punishment is most clearly satisfied when a punitive purpose is conjoined with a characteristically punitive sanction, such as a fine. See generally *Nixon v. Administrator of General Services*, 433 U.S. 425 (1977). (During the impeachment of President Clinton, there was much discussion of whether a congressional resolution censuring him would have been a bill of attainder.) We may assume, again without having to decide still another unsettled issue, that either a punitive purpose or a characteristically punitive sanction would suffice to make legislation directed against a particular individual or firm (of which a given street address is a transparent proxy) a bill of attainder. *Selective Service System v. Minnesota Public Interest Research Group*, 468 U.S. 841, 852-54 (1984); *Nixon v. Administrator of General Services*, *supra*, 433 U.S. at 473-84; *De Veau v. Braisted*, 363 U.S. 144, 160 (1960); *Dehainaut v. Pena*, *supra*, 32 F.3d at 1071-73; *Planned Parenthood of Mid-Missouri and Eastern Kansas, Inc. v. Dempsey*, 167 F.3d 458, 465 (8th Cir. 1999); *SBC Communications, Inc. v. FCC*, *supra*, 154 F.3d at 241; Tribe, *supra*, § 10-5, p. 655. The problem here is that we have no information about the purpose that actuated the petitions and the votes against these licensees; nor is the revocation of a license a characteristically punitive sanction, *Brookpark Entertainment, Inc. v. Taft*, 951 F.2d 710, 717 (6th Cir. 1991); cf. *Rivera v. Pugh*, 194 F.3d 1064, 1068 (9th Cir. 1999); *United States v. Emerson*, 107 F.3d 77, 81-83 (1st Cir. 1997), though it can inflict great hardship.

We need not pursue the issue further, as we think the statute is unconstitutional as a denial of due process of law even if it is not a bill of attainder. We reach this conclusion on the basis of two previous decisions of this court, *Reed v. Village of Shorewood,* 704 F.2d 943 (7th Cir. 1983), and *Philly's v. Byrne,* 732 F.2d 87 (7th Cir. 1984). Neither side in the present litigation challenges the soundness of either decision. They differ as to the decisions' correct interpretation but they do not ask us to overrule either one in whole or in part. And so those decisions provide the framework for our analysis.

Reed holds that an Illinois liquor license is a property right within the meaning of the due process clause of the Fourteenth Amendment. 704 F.2d at 948-49. The license is revocable during its term only for cause, just like a public school teacher's tenure contract—a familiar example of "property" as the Supreme Court has defined the term in the due process clauses of the Fifth and Fourteenth Amendments. E.g., *Perry v. Sindermann,* 408 U.S. 593, 601 (1972). Were renewal a matter of administrative grace, the challenged statute would be vulnerable only in cases in which the license was voided before the expiration of its current term. E.g., *Movers Warehouse, Inc. v. City of Little Canada,* 71 F.3d 716, 718-19 (8th Cir. 1995); *Kraft v. Jacka,* 872 F.2d 862, 866-68 (9th Cir. 1989), overruled on other grounds by *Dennis v. Higgins,* 498 U.S. 439 (1991). But we held in *Reed,* relying on the Illinois Appellate Court's decision in *City of Wyoming v. Liquor Control Comm'n,* 362 N.E.2d 1080, 1084 (Ill. App. 1977), that Illinois law treats a refusal to renew a liquor license as equivalent to revocation, entitling the licensee "to all the protections, procedural and substantive, of the revocation process, [and] thus making [the licensee's] interest in renewal a property right for purposes of the Fourteenth Amendment." 704 F.2d at 949. We followed *Reed* in *Kelly v. City of Chicago,* 4 F.3d 509, 511 (7th Cir. 1993), as well as in

Philly's v. Byrne, supra, 732 F.2d at 90, as did the Sixth Circuit in *Brookpark Entertainment, Inc. v. Taft, supra,* 951 F.2d at 714-15; see also *Easter House v. Felder,* 910 F.2d 1387, 1395 (7th Cir. 1990) (en banc); compare *Herz v. Degnan,* 648 F.2d 201, 208 (3d Cir. 1981).

The City of Chicago (the principal defendant) does not challenge any of these cases though it tweaks us a bit by remarking in a footnote that our holding that a liquor license is property has been rejected by the Illinois Appellate Court in decisions rendered after *Reed. See Blue Cat Lounge, Inc. v. License Appeal Comm'n,* 667 N.E.2d 554, 557 (Ill. App. 1996); *Ole, Ole, Inc. v. Kozubowski,* 543 N.E.2d 178, 181-82 (Ill. App. 1989); *Ross v. Kozubowski,* 538 N.E.2d 623, 626 (Ill. App. 1989); *Black Knight Restaurant, Inc. v. City of Oak Forest,* 513 N.E.2d 109, 111 (Ill. App. 1987). These cases rely on a provision of the Illinois Liquor Control Act which states that a liquor license is not property, 235 ILCS 5/6-1, and on "the wooden distinction between 'rights' and 'privileges' " that the Supreme Court has "fully and finally rejected." *Board of Regents v. Roth,* 408 U.S. 564, 571 (1972). As we explained in *Reed,* such a declaration and such a distinction cannot conclude the *constitutional* issue of whether the license is property, and indeed has very little relevance to it. *Memphis Light, Gas & Water Division v. Craft,* 436 U.S. 1, 9 (1978); *Brookpark Entertainment, Inc. v. Taft, supra,* 951 F.2d at 714; *Sea Girt Restaurant & Tavern Owners Ass'n, Inc. v. Borough of Sea Girt,* 625 F. Supp. 1482, 1486-88 (D. N.J.), aff'd without opinion, 802 F.2d 448 (3d Cir. 1986). Think back to the classic case of constitutional property—a teacher's tenure contract. Obviously such a contract would not be classified as "property" or a "property right" under state law, a classification that would weirdly imply that a teacher could sue his employer for trespass if he were fired in breach of the contract. For most purposes, perhaps for all but one purpose, an Illinois liquor license is

not property; but insofar as it is revocable (or nonrenewable) only for cause, it *is* property for purposes of determining whether the state can deprive the licensee of it without according him due process of law. *Baer v. City of Wauwatosa*, 716 F.2d 1117, 1122 (7th Cir. 1983); see also *Perry v. Sindermann, supra*, 408 U.S. at 601.

The City denies that a liquor license is property for a reason unrelated to *Reed*—that the challenged statute so eviscerates the rights of liquor licensees as to destroy their status as owners of constitutional property. We left this issue open in *Philly's*. 732 F.2d at 90-91. That case arose under the provision, codified in the same section of the Illinois Liquor Control Act as the provision challenged in this case, that allows the voters in a precinct to vote the entire precinct dry, as distinct from prohibiting the sale of liquor at a particular address. We held that there was no denial of due process (see also *Sam & Ali, Inc. v. Ohio Dept. of Liquor Control*, 158 F.3d 397, 398-99 (6th Cir. 1998); *37712, Inc. v. Ohio Dept. of Liquor Control*, 113 F.3d 614, 619 (6th Cir. 1997)) and so we didn't have to decide whether there was a deprivation of property. We did a little dance around the issue. On the one hand we pointed out that the power to vote a precinct dry could conceivably be thought an implicit term of every liquor license, in which event such a license could no longer be thought revocable or nonrenewable for cause and so it would lose the defining characteristic of constitutional property. On the other hand we pointed out that such an analysis, implying as it does that by repealing procedural protections a state could demote property to nonproperty, would leave very little standing of the constitutional protection of property, since the essential protection is precisely the guarantee of the procedural safeguards (basically notice and an opportunity to be heard) that constitute the core of the concept of due process of law as it is understood in the modern decisions.

Today we have to bite the bullet. In conformity with the case law that has accreted since *Philly's* was decided, *see Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 541 (1985); *Youakim v. McDonald*, 71 F.3d 1274, 1289 (7th Cir. 1995); *Listenbee v. City of Milwaukee*, 976 F.2d 348, 352 (7th Cir. 1992); *Campbell v. Miller*, 787 F.2d 217, 223 (7th Cir. 1986); *Furlong v. Shalala*, 156 F.3d 384, 395 (2d Cir. 1998); *Frazier v. Garrison I.S.D.*, 980 F.2d 1514, 1528-29 (5th Cir. 1993); *Brookpark Entertainment, Inc. v. Taft, supra*, 951 F.2d at 716-17, we hold that the two-step process for eliminating due process rights that we have just described, of which the first is to authorize a procedure for extinguishing property rights that does not conform to the requirements of due process and the second is to invoke that process to extinguish a particular person's property right, is ineffectual to destroy constitutional property.

We are mindful that the Twenty-First Amendment to the Constitution gives the states very broad power over the sale of alcoholic beverages. Illinois could if it wanted forbid such sale altogether; it certainly is not required to give liquor licensees the attributes of constitutional property. But it has given them those attributes, as we have seen, and the challenged statute does not purport to remove them. It creates no new substantive criteria for the grant or withdrawal of Illinois liquor licenses. Nothing in it purports to alter the "for cause" condition that makes those licenses property within the meaning of the due process clause. It does not refer to the provisions of Illinois law that we have held make liquor licenses "property" for purposes of the clause, or to the Twenty-First Amendment. All the referendum statute does is provide an alternative procedure for revocation of liquor licenses. This is apparent from the legislative history, as we are about to see. The supporters of the statute believed that it would provide a swifter alternative to administrative

procedures for revoking the licenses of "bad apples," which is to say licensees who had given cause for revocation.

The plaintiffs thus have a property right of which the voters in their precincts deprived them, and the remaining question is whether the deprivation was brought about by a method that denied the plaintiffs due process of law. The City argues "no," relying on *Philly's,* where we held that while an election is not an adjudicative procedure that comports with due process, the fact that the voters of a precinct could get rid of a liquor licensee whom they didn't like (for whatever reason) only by voting the entire precinct dry provided the disfavored licensee with protection and marked the vote as a legislative rather than an adjudicative act. It is the same kind of protection that is provided by the equal protection clause, see *Railway Express Agency v. New York,* 336 U.S. 106, 112-13 (1949) (Jackson, J., concurring), and by the principle, which is the very foundation of the concept of the rule of law (as well as of the prohibition of bills of attainder), that a legislature can prohibit private conduct only through general rules. Chicago precincts are small (each is supposed to have 400 registered voters, 10 ILCS 5/11-3, 11-5), which reduces the protection conferred by requiring the precinct to vote itself dry rather than picking on a particular licensee—many precincts have only one liquor licensee. But we emphasized that "the Illinois act does not permit the precinct's voters to single out a particular liquor seller to shut down. . . . This means not only that the licensee who is disliked is protected to some extent by the licensee who is liked [if there is one] but also that the voters cannot impose costs on liquor sellers without imposing costs on themselves—the costs of not being able to buy liquor in the precinct." 732 F.2d at 92.

Philly's was decided in 1984. Five years later the Illinois legislature added to the Liquor Control Act the provision challenged in this case. Why? The only reason that is suggested in the legislative history, and anyway the only

reason that is remotely plausible, is that the legislature wanted the residents of a precinct to be able to get rid of a particular licensee of whom they disapproved. See, e.g., Statement of Rep. McGann, in Transcript of General Assembly, June 27, 1989, at 138-39 ("But say you have one [tavern] that is causing real problems, causing problems for the neighbors around them and so forth that they cannot affectively [*sic*] by the law presently of the police administration deal with these situations and the community neighbors are having problems. This will not penalize the good licensees in these areas, but will only target that bad operator"). The reason for targeting a particular licensee could be a good one, as this quotation from the legislative history suggests—that the licensee was selling liquor to minors, or serving drunks, or attracting a rowdy lot from other neighborhoods, or disturbing the neighbors with loud music. Any of these could be a solid ground for revocation; and although if there is such a ground the authorities presumably will revoke the license—eventually—the procedures for revocation that comport with due process often take a long time to complete. Their length is a practical reason for wanting to have a substitute mode of revocation that is not encumbered by procedural safeguards. See Statement of Sen. Marovitz, in Transcript of General Assembly, July 1, 1989, at 3 ("you may have a particular bar, a particular tavern that's causing a tremendous problem. I have a lot of them in my district, where you have drug dealers, where you have prostitution, where you have knifings and shootings. We have tried and tried and tried before the Liquor Commission of the City of Chicago to close those taverns. We've been turned away every time"). But the guarantee of due process would mean little if it could be dispensed with upon a showing, which could be made in every case, that a remedy that provides no procedural safeguards at all will be faster and cheaper than one that provides some. The costs of procedural safeguards are only half the formula that the Supreme Court set forth in *Mathews v.*

Eldridge, 424 U.S. 319, 334-35 (1976), for determining the minimum requirements of due process. The other half is the benefits in preventing error. The challenged statute contains no safeguards against error.

A vote by neighbors to decide whether a particular person or firm is a bad apple exemplifies "popular justice," the mode by which an Athenian jury, without deliberation, without instruction or control by professional judges, without possibility of correction on appeal, and without the assistance of lawyers, condemned Socrates. The revocation of the liquor license of the Tequila Roadhouse is not to be compared with the death sentence imposed on Socrates. Yet Socrates received more due process than the Tequila Roadhouse, since he had an opportunity to argue his innocence to the jury and the jury convicted him of a crime, albeit a vague one (corrupting the morals of the young men of Athens by questioning pious certitudes). There is no standard to guide voters in deciding whether to void a liquor license. We need not attribute frivolous motives to them. Yet just as we do not trust jurors to deliberate without instructions, so we should be concerned that an electoral free-for-all might result in serious errors that a due process hearing would avert. The voters might be stirred to action by an influential resident of the precinct who was angry about being refused service because he was inebriated. They might be outraged because one of the taverns in the precinct had topless waitresses—or refused to have them. They might be victims of a campaign of disinformation by a competing tavern—a possibility that concerned Representative Matijevich, who in Transcript of General Assembly, June 27, 1989, at 137-38, observed: "let's say that in a precinct there are two establishments, only two establishments. And one establishment may have some political pull. . . . [Y]ou may have that establishment lobbying in an election to get the other competition out of business for no other reason than he likes to get all the business for him-

self." They might be induced to vote against a tavern by a precinct captain who was on the outs with the tavern's owner. The possibilities are myriad and some of them are unsavory, and against them the procedure established by the challenged statute offers no protection at all.

This will not bother anyone who believes that the democratic process should be left completely unhindered by law. But that is not the theory of the Constitution. An individual's life, liberty, and property are not held or enjoyed at the sufferance of the electorate. When the Illinois legislature stepped from allowing a precinct's voters to vote the precinct dry to allowing the voters to expel a particular disfavored licensee, it crossed the line that protects property holders from being deprived of their property without due process of law. Although taverns are not the most popular businesses in some quarters, no principle is suggested that would limit the power claimed by the City to the sale of alcoholic beverages. Its position casts a long shadow over all property rights. We pointed out earlier that the state has not attempted to exert its plenary powers under the Twenty-First Amendment to curtail the abuses to which the sale of alcoholic beverages may give rise.

Nothing that we have said is intended to suggest that referenda are unconstitutional. The Constitution does not forbid direct democracy. *City of Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668 (1976), holds that voters can be empowered to act as legislators—but that is provided that the action they are empowered to take is legislative. *City of Eastlake* was a zoning case, and zoning is on the legislative side of the legislative/judicial divide. *River Park, Inc. v. City of Highland Park*, 23 F.3d 164, 166-67 (7th Cir. 1994); *Coniston Corp. v. Village of Hoffman Estates*, 844 F.2d 461, 468-69 (7th Cir. 1988). This is not only because "the decision whether and what kind of land uses to permit does not have the form of a judicial decision. The potential criteria and

considerations are too open-ended and ill-defined." *Id.* at 468. It is also because zoning, like ordinary legislation, operates prospectively. The lawful destruction of existing property is the domain of nuisance law, a branch of tort law that is applied by courts to specific offending properties. As Justice Holmes, writing for the Court in *Prentis v. Atlantic Coast Line Co.*, 211 U.S. 210, 226-27 (1908) (citations omitted), pointed out, "A judicial inquiry investigates, declares, and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is its purpose and end. Legislation, on the other hand, looks to the future and changes existing conditions by making a new rule, to be applied thereafter to all or some part of those subject to its power. . . . Proceedings legislative in nature are not proceedings in a court, . . . , no matter what may be the general or dominant character of the body in which they may take place. That question depends not upon the character of the body, but upon the character of the proceedings." See also *New Orleans Public Service, Inc. v. Council of City of New Orleans*, 491 U.S. 350, 370-71 (1989).

The statute that is challenged in this case does not authorize the voters to determine, in the manner of zoning, where liquor may be sold (a possible interpretation of *Philly's*); it authorizes them to evict a particular seller, as if they were the judges of a housing court or a judge asked to abate a nuisance. Cf. *Nasierowski Bros. Investment Co. v. City of Sterling Heights*, 949 F.2d 890, 895-96 (6th Cir. 1991); *Harris v. County of Riverside*, 904 F.2d 497, 501-04 (9th Cir. 1990). The vote is limited to a specific street address currently occupied by a licensee, 235 ILCS 5/9-2; it does not prevent the sale of liquor next door. In the typical zoning case *prospective* uses of property are in issue, and decision making is likely to be based on general, legislative grounds. Voters are likely to consider whether they want a building "like that" in their neighborhood. The primary factor in a targeted liquor

referendum is bound to be, in contrast, the past behavior of the tavern, for the voters have already decided to permit businesses "like that" in the neighborhood. (Remember that they could vote the precinct dry if they wanted.) Something has forced them to change their minds about *this* tavern, and the only plausible explanation is the tavern's behavior, but the evaluation of past behavior for conformity to norms of proper conduct is the domain of adjudication.

So the issue "is not too much delegation, but delegation to the wrong body: delegation of judicial decision-making, for example, to people who are not judges." *United Beverage Co. of South Bend, Inc. v. Indiana Alcoholic Beverage Comm'n*, 760 F.2d 155, 159 (7th Cir. 1985); see also *City of Eastlake v. Forest City Enterprises, Inc., supra*, 426 U.S. at 678; *Seattle Title Trust Co. v. Roberge*, 278 U.S. 116, 121-22 (1928); *Eubank v. City of Richmond*, 226 U.S. 137 (1912); *Jones v. Bates*, 127 F.3d 839, 858 n. 25 (9th Cir. 1997); *General Elec. Co. v. New York State Dept. of Labor*, 936 F.2d 1448, 1454-55 (2d Cir. 1991); *Scott v. Greenville County*, 716 F.2d 1409, 1420 n. 16 (4th Cir. 1983). That is what Illinois has done and what the due process clause prohibits.

REVERSED.

BAUER, *Circuit Judge,* dissenting. In order to better understand the ramifications of the majority opinion, a bit of urban reality is, I believe, in order.

The residents of the City of Chicago, 2,700,000 or more, live in neighborhoods characterized by their homogeneity. The residents share, in general, the same socio-economic status, the homes are strikingly similar in configuration and costs, and the blue-collar/white-collar employment of the workers are usually the same. Racial and/or ethnic backgrounds tend to be similar. Although neighborhoods have no recognized political existence, they are there, with or without political acknowledgment, and it is there that Chicagoans live, marry, raise families, socialize and die. Most of the residents lack real mobility of choice; affordable housing near or convenient to employment or transportation is what they must settle for. Stability of neighborhood and safety are their primary objectives. Many have no choice at all; public housing or subsidized housing dictates where they live.

What businesses are in or around these neighborhoods are there because the zoning laws and licensing regulations, planned on a city-wide basis, permit their existence. (Of course, the business investors look for areas of opportunity and that plays a major role in what businesses exist side by side with the residential buildings.)

Barber shops, grocery stores, convenience markets, drugstores, restaurants, tailor shops, all these exist in the neighborhoods and add to the livability of the area. One business, however, is acknowledged to have a greater impact on the tone of a neighborhood than any other—the liquor business.

For purposes of this case, we need not think in terms of liquor stores but only those licensed premises which purvey drinks by the glass. They include most fine restaurants, many

family or ethnic restaurants, and neighborhood saloons; those places that Chicago historians called the working man's social clubs. It is here that the people meet, not just to drink, but to eat, to celebrate birthdays, anniversaries and other special occasions and to socialize with people of the neighborhood.

When Illinois exercised its right to control (or ban altogether) the sale of liquor, it opted to create a system of local-option rules. The decision as to whether to permit liquor sales, to define how many and where such emporiums could exist was left to cities and villages and even counties for the unincorporated areas. Moreover, the towns and villages, many with a smaller total population than a Chicago precinct, can determine the character of the liquor emporium. They can, for instance, regulate the type of entertainment a licensee can offer the public, the hours and days of purveying, or even restrict the sale of liquor to hotels or places that serve food. Because of its size, however, Chicago (technically, cities of a certain size that only Chicago meets) is treated differently. Recognizing that neighborhoods most closely resemble small towns, the legislature sought to give some local control.

There is, however, as we have said, no political entity called a "neighborhood"; its closest parallel is the precinct. A "precinct" is not a definable graphic area; it is an entity that exists only to facilitate voting. It is created by the city in its establishment of places to vote; ideally, each precinct will contain 400 registered voters. When the number of registered voters goes much above or below that figure, the precinct boundaries must, by law, be redrawn. This to ensure a conveniently close place for voters to exercise their franchise and to reduce the possibility of long lines of voters waiting for a vacant polling booth.

Of course, in addition to the 400 registered voters, the precinct will contain many more people: those ineligible to vote because of their minority, non-citizens, those who have

not established sufficient length of residency and (if voter registration proponents are to be believed) a large number of people, otherwise eligible, who have not bothered to register to vote. In short, a "precinct" is close to being a neighborhood or a small town *and* it has a political existence. And local option of sort is granted to these entities.

As I said, it is usually to the economic self-interest of a license holder to maintain cordial and friendly relations with the people of the area where his establishment is located; they are a source of business to him. There are some establishments that attract patrons from areas distant from the precinct, either because of a particular form of entertainment, glowing restaurant reviews, proximity to sports arenas, etc. (The people living near sports arenas show an extraordinary patience with absurd activities of the fans, but it is also true that the sports bars make extraordinary efforts to keep the locals happy. Properly speaking, the two groups establish a mutually advantageous economic truce. The saloons and restaurants are sources of employment—as in the area itself—and the locals provide *some* patronage during off-season months).

As to the premises that cater to different clientele, strip-tease fans, loud music fans, youth groups, bikers—not to mention premises that cater to the drug culture or other illegal activities—these groups try to keep the irritation level of the activity to a minimum because *they* know about the local-option laws. And if enough of their neighbors get pushed hard enough, they can respond by eliminating the problem through the ballot box.

To suggest, as the majority opinion does, that a voter who is disgruntled by the refusal of a bartender to serve him while inebriated can eliminate a license, is to ridicule the intelligence of the voters. To imagine that such a malcontent could convince a majority of the voters in a precinct (or even the smaller number called for to place the issue on the ballot)

to take up the cudgel of the ballot on such a silly crusade is, itself, ridiculous.

The fact is the motivation behind such a difficult task as securing signatures on a petition and votes in the ballot box is one the majority should well understand: cost-benefit. The term may not be used but, as we know, it is the real motivation behind most human activity. I should think that this constitutionally permitted reason should be both understood and applauded.

As we have seen, most liquor license holders are benign influences in the areas around them, even serving to enhance the livability and property values of the neighborhood. Nevertheless, under the original rule of local option, the precinct had only one choice: vote entirely dry or put up with the one or more festering sores.

The right of the precincts to vote entirely dry was endorsed by this court (indeed, by the author of the majority opinion in the instant case). And if there is only one such establishment in the precinct and only one possible target of the vote-to-go-dry, it still passes constitutional muster. Apparently, the constitutional rights of an individual liquor license holder increase with the number of licenses in a precinct; they can take shelter in the acceptance of their good brothers-in-business and thumb their noses at the legitimate wishes of the residents of the neighborhood.

The legislature recognized the unfairness of this all-or-nothing approach to the wet/dry dilemma when they amended the local-option law to permit a referendum on the issue of whether a single (or, I assume, more than one) liquor establishment shall continue to be licensed in the precinct. This is so that the businesses which have decent regard for the preservation of the community standards can remain and their property rights not scuttled by a bad apple in the liquor dispensing barrel.

The majority opinion agrees with the Supreme Court that the Constitution does not forbid direct democracy. What seems to be the theme of the opinion is that, under the local-option rule, voters can exercise their franchise without "standards to guide the voters in deciding whether to void a liquor license." One assumes by this, "judicial guides." And, of course, such is the price of democracy; the voters may make a choice that their betters may not approve.

The majority opinion points to the use of judicial instructions in jury trials and describes the referendum (or election) process as an "electoral free-for-all" that might result "in serious error." Just so. The process of democratic government does not rely on stern lectures from the highly educated. The least of us has the right to express himself or herself in the ballot box without deference to the ruling classes. It is also of interest to note that a precinct, if so inclined, can, as this court (and the author of the instant majority opinion) has ruled, snuff out the license rights of one, or any number of, licensees in the precinct without the splendid guidance of court or city fathers, providing that *all* the licensees in the precinct are eliminated. Why is the same use of the ballot box constitutionally infirm if the licensees affected are fewer than all of those in the precinct? If "guidance" is required to make the decision of the voters constitutionally kosher, why not require that such guidance (whatever *that* might be!) be required for all referenda that affect a property right (bond issues, annexation, establishment of school districts and mosquito abatement districts, etc.)?

It is not accurate to say, as the majority opinion does, that, before a referendum is undertaken "the voters have already decided to permit businesses" like that "in the neighborhood" because they could vote the precinct dry if they wanted to. What is more accurate is that they made *no* decision at all; the city makes it for them. It is probably also safe to say that not one voter in fifty even *knows* about the local-option rule and

only a crisis in the neighborhood eventually *may* serve to enlighten them—and then after every other avenue to correct a problem involving a liquor licensee (petitioning the city liquor commission, calling the police, calling the alderman, etc.) has failed.

The deprivation of property, discussed by the majority, occurs in exactly the same way whether the voters wipe out *all* of the liquor vendors in a precinct or a single vendor. I fail to see how a total deprivation of "property rights" that affects two or more owners is *more* constitutional than the same action which affects only one liquor emporium.

It is worthwhile considering how much trouble such a referendum is to the people of the precinct. First, to focus the residents on the way to solve the problem (I'm willing to assume the existence of the problem and knowledge of its existence among the neighbors), then to secure sufficient signatures to get the matter placed on the ballot, and then to campaign successfully enough to get a majority of the voters to vote against an existing business. The effort involved and the work entailed should at least indicate to us the incredible problem the licensee must be causing. And it is a fact that, like Socrates, the liquor dispenser has an opportunity to present his defense to the jury (i.e., the voters); he can campaign as hard against the referendum as his opponents argue for it; it might even convince him to reform *before* the vote and become a good neighbor.

I believe that the legislature of Illinois and its court system can protect the rights of its citizens in the field of liquor control and neighborhood safety. If it is constitutionally proper for the voters of a precinct to ban the only bar in the area, or all the bars in the neighborhood, I cannot believe that it is constitutionally improper for the legislature to authorize, and the voters to exercise, a right to prohibit the operation of a particular liquor license. There is no constitutional right to be in the liquor business and I cannot believe that the

authorization of a referendum as to whether a particular saloon shall be permitted in a neighborhood is an invasion of a constitutional right. I suspect it depends on whose constitutional property rights should concern us. I think the rights of the people who live in the area should have our deepest concern.

I would affirm the dismissal of the case.

A true Copy:
Teste:

_____
Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 98 C 6961
HONORABLE CHARLES R. NORGLE

N&N CATERING COMPANY, INC.,
Plaintiff,

v.

CITY OF CHICAGO,
Defendants.

No. 98 C 7831 (related case)

ALBERTO BEDOYA d/b/a
CASANOVA'S, INC.,
Plaintiff,

v.

CITY OF CHICAGO, RICHARD M. DALEY,
as Mayor and Commissioner of the Liquor Control
Commission of the City of Chicago,
LIQUOR CONTROL COMMISSION OF THE
CITY OF CHICAGO
Defendants.

No. 98 C 8054 (related case)

CLUB MISTY, INC., d/b/a
TEQUILA ROADHOUSE,

Plaintiff,

v.

JAMES LASKI, Clerk of the City of Chicago,
BOARD OF ELECTION COMMISSIONERS
OF THE CITY OF CHICAGO; AND CITY OF
CHICAGO,

Defendants.

OPINION and ORDER

CHARLES R. NORGLE, SR., District Judge:

Before the court are challenges to the constitutionality of the single-address local option provision of the Illinois Liquor Control Act, 235 ILCS 5/9-2 (1995). For the following reasons, those challenges brought pursuant to the federal constitution are denied. The court declines to exercise its jurisdiction over the claim attacking the Liquor Control Act on state constitutional grounds.

I. BACKGROUND

The plaintiffs in these three related actions hold state and city licenses authorizing them to sell alcohol at their respective establishments within the City of Chicago. What they share in common is that single-address local option referenda under the Illinois Liquor Control Act ("Liquor Control Act"), 235 ILCS 5/9-2 (1995), jeopardize the validity of their liquor licenses. In a prior Opinion and Order, this court temporarily enjoined on due process grounds the enforcement of a local option referendum passed pursuant to the Liquor Control Act. If operative, the referendum would have extinguished Plaintiff N&N Catering

Company's ("N&N") licenses to sell alcohol at the International Amphitheatre. *See N&N Catering Co. v. City of Chicago*, 26 F. Supp.2d 1067 (N.D. Ill. 1998).

Two other liquor licensees, Alberto Bedoya ("Bedoya") and Club Misty Inc. ("Club Misty"), have since filed actions in federal court on the same constitutional grounds as N&N. Because their respective complaints include claims nearly identical to those raised by N&N, Bedoya and Club Misty each moved for reassignment of their cases to this court pursuant to Local Rule 2.31. Like N&N, Bedoya seeks an order enjoining enforcement of a local option referendum passed in the November 3, 1998, election. The City of Chicago ("the City"), however, has agreed not to enforce *any* local option referenda from that election until the court issues a final ruling on the constitutionality of the Liquor Control Act. In contrast to N&N and Bedoya's claims for post-election relief, Club Misty seeks a pre-election ruling that would enjoin placement of a local option referendum on the ballot for the February 23, 1999, election.

Although the three related cases may not be at identical stages of litigation, they each seek a decision on the same constitutional issues. In fact, N&N, Bedoya, and Club Misty (collectively referred to as "the Licensees") have filed consolidated memoranda in support of their claims. Thus, in the interests of judicial economy, the court submits the following opinion as a comprehensive adjudication of all three actions.

N&N Catering Co. v. City of Chicago, 98 C 6961

N&N is licensed to sell alcoholic beverages for on-premises consumption at 4220 S. Halsted in Chicago; 4220 S. Halsted is a notable address in Chicago because it is the site of the International Amphitheatre ("the Amphitheatre"), an

arena which has a considerable place in the city's history.[1] In July 1998, certain residents of the precinct surrounding the Amphitheatre initiated a campaign to prohibit the sale of alcohol at the arena's address. Pursuant to the local option provision of the Liquor Control Act, 235 ILCS 5/9-2, those residents began circulating petitions that would allow precinct voters to decide, via referendum, whether to prohibit the sale of alcohol at 4220 S. Halsted.

The petition read, in relevant part:

> To the City Clerk of the City of Chicago, Illinois:
>
> The undersigned, residents of the *35th* Precinct of the *11th* Ward of the City of Chicago, County of Cook, State of Illinois, respectfully petition that you cause to be submitted in the manner provided by law, to the voters thereof, at the next election to be held on November 3, 1998 the proposition:
>
> "Shall the sale at retail of alcoholic liquor be prohibited at the following address:
>
> *4220 South Halsted Street, Chicago, Illinois*"

(N&N Orig. Mem., Ex. A.); *see also* 235 ILCS 5/9-2, 9-4.

By August 4, 1998, the petition included the "signatures of not less than 40% of the legal voters" residing in the precinct, thereby requiring the Clerk of the City of Chicago to take the necessary administrative steps to place the referendum on the November 3rd ballot. *See* 235 ILCS 5/9-2, 9-10.

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[1] For a brief review of some of the events that have taken place at the Amphitheatre, *see N&N Catering Co.*, 26 F. Supp. 2d at 1068 (*citing* John Kass, *Daley Wants to Buy, Raze Amphitheatre*, Chicago Trib., October 9, 1996 (Metro Chicago section), at 3, 1996 WL 2715347 and Robert Davis, *Amphitheatre Comes Back From Oblivion*, Chicago Trib., November 27, 1987, (Chicagoland section), at 1, 1987 WL 2999569).

N&N, however, sought to prevent the referendum from being placed on the November 3rd ballot. On October 8, 1998, N&N filed suit in state court against James Laski ("Laski"), as Clerk of the City of Chicago, and the Board of Election Commissioners of the City of Chicago ("the Board of Election"). In its complaint, N&N challenged the validity of the petitions, *see* 235 ILCS 5/9-4, 9-19, and alleged that the Liquor Control Act deprived it of due process of law. (*See* City's Orig. Resp. at 1, 10.) On October 21, 1998, the Circuit Court of Cook County dismissed the suit, concluding that "[t]he failure of the Plaintiffs in this cause to file a bond for costs within the time prescribed by 235 ILCS 5/9-4 deprives this court of jurisdiction to hear this cause." (*Id.*, Ex. 1.) On October 30, 1998, the Illinois Appellate Court issued an order affirming the trial court's decision. (*Id.*, Ex. 2.)

On that same day, N&N filed a six-count complaint in federal court under 42 U.S.C. § 1983 and 28 U.S.C. § 1367(a), again naming Laski and the Board of Election as defendants. N&N alleges that the single-address local option provision of the Liquor Control Act, 235 ILCS 5/9-2, violates its rights under the United States and Illinois constitutions. Specifically, the complaint alleges that the Liquor Control Act: (1) deprives N&N of its liquor license without due process of law in violation of the Fourteenth Amendment; (2) violates N&N's "rights to equal protection of the laws under the Fourteenth Amendment" by treating N&N differently from other similarly situated establishments within the 35th precinct; (3) violates the Bill of Attainder Clause of Article I, Section 10, of the United States Constitution by creating "a mechanism through which voters enact into law a provision which legislatively singles out an identifiable individual establishment for guilt and punishes it without the protection of judicial trial"; (4) creates an arbitrary and groundless distinction between the City of Chicago and all other municipalities within Illinois, thereby depriving licensees

within the City of Chicago of equal protection of the laws under the Fourteenth Amendment; and (5) grants a special privilege and immunity to similarly situated retail establishments located outside the City of Chicago in violation of the Special Legislation Clause, Article 4, Section 13 of the 1970 Illinois Constitution.

To those ends, N&N's prayer for relief seeks the following: (1) an order declaring the single-address local option provision of 235 ILCS 5/9-2 unconstitutional, invalid and void; (2) a preliminary, and ultimately permanent, injunction voiding the results of the November 3rd referendum and prohibiting its enforcement; (3) a preliminary, and ultimately permanent, injunction prohibiting the City from taking any adverse action against N&N in relation to the November 3rd referendum; and (4) reasonable attorney's fees pursuant to 42 U.S.C. § 1988.

With the November 3rd election date fast-approaching, N&N immediately moved for a temporary restraining order to enjoin Laski and the Board of Election from placing the referendum on the ballot. On November 2, 1998, however, N&N withdrew its motion, and the court ordered this matter certified to the Attorney General of the State of Illinois pursuant to 28 U.S.C. § 2403(b). *See also* Fed. R. Civ. P. 24(c); *Perez v. City of Chicago*, 95 C 685, 1995 WL 410981, at *6 (N.D. Ill. July 10, 1995).

The referendum was thus placed to a vote on November 3, 1998. The final voting tally was 178 in favor of passing the referendum and 88 against. Put another way, 67% of the ballots cast in the 35th precinct indicated that voters wanted to prohibit the sale of alcohol at the Amphitheatre. The referendum's passage by a simple majority of 35th precinct voters thus extinguished N&N's licenses to sell alcohol at the venue. *See* 235 ILCS 5/9-2.

As provided in the Liquor Control Act, the results of the referendum "become operative on the 30th day after the day of the election at which such vote is cast." 235 ILCS 5/9-3. Although N&N abandoned its effort in federal court to enjoin the referendum from being placed to a vote, it still sought to enjoin the impending, early December enforcement date of the referendum.

In support of its prayer for declaratory and injunctive relief, N&N presented only two arguments. First, N&N argued that the Liquor Control Act denies it due process of law by allowing a precinct to vote a single address dry. Second, N&N argued that the Liquor Control Act violates the Special Legislation Clause of the Illinois Constitution because it "arbitrarily distinguishes between Chicago and other municipalities in Illinois." On December 3, 1998, this court issued a preliminary injunction that enjoined the City's enforcement of the referendum on due process grounds. The court, however, expressed reservations about the merits of N&N's due process claim and declined to determine conclusively at that juncture whether the Liquor Control Act withstands constitutional scrutiny. In the meantime, the parties have presented further arguments on the issue, and the Illinois Attorney General has notified the court that it declines to participate in this action. *See generally* 28 U.S.C. § 2403(b); 15 ILCS 205/4. Thus, Case Number 98 C 6961 is now ripe for final disposition on all of N&N's claims for declaratory and permanent injunctive relief.

Alberto Bedoya d/b/a Casanova's Inc. v. City of Chicago, et al., 98 C 7831

Plaintiff in Case Number 98 C 7831 is Alberto Bedoya ("Bedoya"), a liquor licensee in the 8th Precinct of the 33rd Ward. Since 1980, Bedoya has sold alcoholic beverages for on-premises consumption at 2415 W. Lawrence Avenue, where he operates an establishment called "Casanova's." Pursuant to the Liquor Control Act, residents of the 8th

Precinct voted in the November 3rd election to prohibit the sale of alcohol at "2415 W. Lawrence Ave., Chicago." The local option referendum passed by a tally of 176 to 52.

In the wake of the court's Opinion and Order granting temporary injunctive relief in favor of N&N, Bedoya filed a complaint for declaratory and injunctive relief on December 11, 1998. Like N&N, Bedoya notes that several other liquor establishments within his precinct remain in business—not threatened by the prospect of a local option referendum. The only relevant difference between N&N's action and Bedoya's is that Bedoya's complaint does not include a claim that the Liquor Control Act violates the Bill of Attainder Clause of the United States Constitution, Art. I, § 10, cl. 1. As already noted, the City has agreed to stay enforcement of the results of local option referenda from the November 3rd election until this court issues a final ruling on the constitutionality of the Liquor Control Act. Therefore, the court may proceed directly to Bedoya's claims for declaratory and permanent injunctive relief.

Club Misty, Inc. d/b/a Tequila Roadhouse v. Laski, et al., 98 C 8054

Plaintiff in Case Number 98 C 8054 is Club Misty, Inc., a liquor licensee in the 26th Precinct of the 43rd Ward. Since the early 1980's, Club Misty has sold alcoholic beverages for on-premises consumption at 1653 N. Wells Street, where it currently operates an establishment called "Tequila Roadhouse." Soon after the November 1998 election, certain residents of the 26th Precinct initiated a campaign to prohibit the sale of alcohol at that address. Pursuant to the local option provision of the Liquor Control Act, 235 ILCS 5/9-2, those residents began circulating a petition that would allow precinct voters to decide in the February 23, 1999, election whether the sale of alcohol should be prohibited at 1653 N. Wells Street. With over 95% of 26th precinct residents

residing in one high-rise building, the petition drive did not entail neighborhood canvassing, and was successful in obtaining the requisite amount of signatures within two weeks.[2]

On December 15, 1998, Club Misty filed a federal complaint alleging the same claims as N&N's complaint, including a claim that the Liquor Control Act violates the Bill of Attainder Clause. The only notable difference in Club Misty's action is that it filed suit in federal court well before the election. Nonetheless, that Club Misty seeks preemptive relief does not preclude the adjudication of its action with *N&N Catering* and *Bedoya*.

II. DISCUSSION

A. Overview

The regulation of alcohol has a long history in the United States, with the Prohibition Era being the most notable period. *See generally Craig v. Boren*, 429 U.S. 190, 205 (1976); *Mugler v. Kansas*, 123 U.S. 623 (1887); Mihir A. Munshi, *Share the Wine—Liquor Control in Pennsylvania: A Time for Reform*, 58 U. Pitt. L. Rev. 507, 508-12 (Winter 1997). The Eighteenth Amendment in 1919 initiated the Prohibition Era, as it prohibited "the manufacture, sale, or transportation of intoxicating liquors" in the United States and its territories. In 1933, the Twenty-first Amendment repealed the Eighteenth Amendment and "delegated to the several states the power to prohibit commerce in, or the use of, alcoholic beverages." *44 Liquormart v. Rhode Island*, 517 U.S. 484, 514 (1996). Since then, however, the Supreme Court has commented that "the [Twenty-first] Amendment does not license the States to ignore their obligations under

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[2] Out of 209 signatories to the petition, only one does not reside in the high-rise building. (*See* Club Misty Compl., Ex. 1.)

other provisions of the Constitution." *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 712 (1984); *see also 44 Liquormart*, 517 U.S. at 516 (holding that "the Twenty-first Amendment does not qualify the constitutional prohibition against laws abridging the freedom of speech embodied in the First Amendment."). "Neither the text nor the history of the Twenty-first Amendment suggests that it qualifies individual rights protected by the Bill of Rights and the Fourteenth Amendment where the sale of liquor is concerned." *Craig*, 429 U.S. at 206 (citation and internal quotation marks omitted). Yet the Court has also recognized that "[e]ntirely apart from the Twenty-first Amendment, the State has ample power to prohibit the sale of alcohol in inappropriate locations." *44 Liquormart*, 517 U.S. at 515. Indeed, "[l]iquor laws are enacted by virtue of the [State's] police power to protect the health, morals, and welfare of the public." *Eberle v. People of the State of Michigan*, 232 U.S. 700, 707 (1914); *see also Ziffrin. Inc. v. Reeves*, 308 U.S. 132, 138 (1939); *cf. Scott v. Village of Kewaskum*, 786 F.2d 338, 341 (7th Cir. 1986) ("The twenty-first amendment gives states special powers over the sale of liquor, powers that have been held to diminish even rights granted by the first amendment and hence the fourteenth."); *United Beverage Co. of South Bend Inc. v. Indiana Alcoholic Beverage Comm.*, 760 F.2d 155, 159 (7th Cir. 1985) ("[T]he states have, by virtue of the Twenty-First Amendment, broader authority over the liquor business than over any other business . . . though of course not plenary authority. . . .").

Via the local option provision of the Liquor Control Act, Illinois law provides a democratic mechanism, a referendum, in which residents of Chicago precincts may prohibit the sale of alcohol precinct-wide or at a single address. *See* 235 ILCS 5/9-2. In a case nearly a century ago, the Court refused to strike down a similar local option provision in Alabama, rejecting the argument that a vote in favor of precinct-wide

prohibition violated a liquor seller's due process rights. *See Rippey v. Texas*, 193 U.S. 504, 509-10 (1904). The Court concluded that a state "does not abridge" its power over the sale of alcohol by allowing its citizens to vote on prohibition. *Id.; see also Ohio v. Dollison*, 194 U.S. 445, 448-49 (1904). Similarly, in a relatively recent case addressing a precinct-wide prohibition under the Liquor Control Act, the Seventh Circuit remarked, "Illinois local-option liquor law is just section 2 of the Twenty-First Amendment writ small."[3] *Philly's v. Byrne*, 732 F.2d 87, 92 (7th Cir. 1984). *But see 87 South Rothschild Liquor Mart v. Kozubowski*, 752 F. Supp. 839, 842 (ND. Ill. 1990) (declaring the *"single establishment"* local option provision of the Liquor Control Act (1989) unconstitutional on due process grounds). Further, the *Philly's* court deemed a precinct-wide referendum to decide whether liquor may be sold in a particular area "a pragmatic as well as venerable response to the social problems created by the sale and consumption of liquor." *Philly's*, 732 F.2d at 92. The Sixth Circuit, while reviewing a similar local option provision under Ohio law, shared this view, commenting: "Local voters possess a legitimate interest in regulating the types, modes, and circumstances of alcohol sales in their neighborhood." *37712, Inc. v. Ohio Dept. of Liquor Control*, 113 F.3d 614, 620 (6th Cir. 1997); *see generally* Shelly Ross Saxer, *"Down with Demon Drink!": Strategies for Resolving*

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[3] Section 2 of the Twenty-first Amendment provides that "[t]he transportation or importation into any State . . . for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited. U.S. Const. amend. XXI, § 2. Though the language of § 2 does not appear to authorize state control of the sale of liquor, that is how courts have interpreted the section. *See* Laurence H. Tribe, *How to Violate the Constitution without Really Trying: Lessons from the Repeal of Prohibition to the Balanced Budget Amendment*, 12 Const. Comment. 217, 218-21 (Summer, 1995).

Liquor Outlet Overconcentration in Urban Areas, 35 Santa Clara L. Rev. 123 (1994).

Of course in each of the instant cases, it appears that the primary concern of local voters is the sale of alcohol at a single address, rather than the overall sale of alcohol in their respective precincts. Consequently, the Licensees each contend that they are being unfairly targeted while other liquor licensees within their respective precincts continue to sell alcohol without protest. That raises questions with respect to the fairness of the Liquor Control Act. Nonetheless, the perceived unfairness of the Liquor Control Act is not the issue here; nor is the wisdom of the legislature. The question is simply whether the Liquor Control Act passes constitutional scrutiny. *Cf., e.g., Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963) ("The doctrine that . . . due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely . . . has long since been discarded."). That said, the court turns to the constitutional issues at bar.

As a preliminary matter, it is well-established that federal courts generally are reluctant to declare state statutes unconstitutional, as state statutes are entitled to a presumption of constitutionality. *See Dept. of Revenue of Mont. v. Kurth Ranch*, 511 U.S. 767, 796 (1994); *Illinois v. Krull*, 480 U.S. 340, 351 (1987); *Cohen v. City of Des Plaines*, 8 F.3d 484, 489 (7th Cir. 1993); *Andree v. Ashland Cty.*, 818 F.2d 1306, 1313 (7th Cir. 1987). At least two points follow from this statement.

First, the burden is on the Licensees to show that the Illinois Liquor Control Act is unconstitutional. *Cf. United States v. Salerno*, 481 U.S. 739, 745 (1987); *In re Konizeski*, 820 F.2d 982, 990 (9th Cir. 1987); *Kraft General Foods, Inc. v. Iowa Dept. of Rev., 505* U.S. 82-83 (1992) (Rehnquist, C.J., dissenting). The Licensees, however, submit supporting arguments only on their claims under the Due Process Clause,

the Bill of Attainder Clause, and the Special Legislation Clause of the Illinois Constitution. (Licensees' Supp. Mem. at 43 n.22 (express waiver of one equal protection argument)). Because the Licensees fail to present arguments on their remaining claims, *e.g.*, their equal protection claims, the court deems those claims waived. *See Mathis v. New York Life Ins. Co.*, 133 F.3d 546, 548 (7th Cir. 1998) ("'A litigant who fails to press a point by supporting with pertinent authority, or by showing why it is sound despite a lack of supporting authority . . . forfeits the point. We will not do his research for him.'") (*quoting Pelfresne v. Village of Williams Bay*, 917 F.2d 1017, 1023 (7th Cir. 1990)); *see also Sledd v. Lindsay*, 102 F.3d 282, 288 (7th Cir. 1996); *Doe v. Johnson*, 52 F.3d 1448, 1457 (7th Cir. 1995).

Second, federal courts' reluctance to address issues of state governance is intertwined with an important doctrine that the parties have failed to raise here: abstention. Nonetheless, there is currently no certain indication that the court should abstain from exercising its federal (original) jurisdiction in favor of the state courts. *See generally Colorado River Water Conservation Dist. v. States*, 424 U.S. 800, 813 (1976) ("Abstention from the exercise of jurisdiction is the exception, not the rule."); *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943); *Railroad Comm'n of Tex. v. Pullman Co.*, 312 U.S. 496 (1941); *Waldron v. McAtee*, 723 F.2d 1348, 1351 (7th Cir. 1983); *Ahrensfield v. Stephens*, 528 F.2d 193, 196 (7th Cir. 1975); *Lowery v. Schnorf*, 97 C 6688, 1998 WL 341835, at *3 (N.D. Ill. June 18, 1998); *Jack & Lou's, Inc. v. County of Cook*, 93 C 5196, 1994 WL 91963, at *2 (N.D. Ill. March 18, 1994); *Ross v. City of Chicago*, 89 C 8049, 1989 WL 157332, at *4 (N.D. Ill. Dec. 18, 1989); *Van Drunen v. Village of South Holland*, 550 F. Supp. 258, 260 (N.D.Ill. 1982). Though the constitutionality of a state statute is at issue, the court has a "virtually unflagging obligation" to exercise its jurisdiction over federal questions—in this case

via 42 U.S.C. § 1983. *Illinois Bell Tel. Co. v. Illinois Commerce Comm'n*, 740 F.2d 566, 569 (7th Cir. 1984) (*quoting Colorado River*, 424 U.S. at 817); *see also Toney v. Burris*, 829 F.2d 622, 624 (7th Cir. 1987) ("[B]ecause the statute implicated the plaintiff's due process rights under the fourteenth amendment to the federal Constitution there was no reason for the district court to abstain from deciding the case in favor of the state courts.").

That obligation is not nearly as exacting with respect to the court's jurisdiction over supplementary state claims. *See* 28 U.S.C. § 1367(c). While this suggests that the court should initially address the Licensees' federal claims, the doctrine of constitutional avoidance teaches that "federal courts should avoid addressing federal constitutional issues when it is possible to dispose of a case on pendent state grounds." *Triple G Landfills. Inc. v. Bd of Commissioners of Fountain County, Ind.*, 977 F.2d 287, 291 (7th Cir. 1992); *see also RAR, Inc. v. Turner Diesel*, Ltd., 107 F.3d 1272, 1276 (7th Cir. 1997). It is not clear, however, whether the court should address the pendent state claim here, *i.e.*, the Licensees' assertion that the Liquor Control Act's population classification violates the Special Legislation Clause of the 1970 Illinois Constitution.[4] That claim calls for a federal court to determine whether a state statute runs afoul of a state constitution; such a question is better-suited for the Illinois state courts, and ultimately the Illinois Supreme Court, to answer. *See BMW of North America, Inc. v. Gore*, 517 U.S. 559, 577 (1996) ("[O]nly state courts may authoritatively construe state statutes."). And though the Illinois Appellate

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[4] The Special Legislation Clause provides: "The General Assembly shall pass no special or local law when a general law is or can be made applicable. Whether a general law is or can be made applicable shall be a matter of judicial determination." Ill. Const. 1970, art. IV, § 13.

Court has upheld the Liquor Control Act's population classification as constitutional under the Special Legislation Clause, *see* e.g., *Gorgees v. Daley*, 628 N.E.2d 721, 726 (Ill. App. Ct. 1993) and *Rincon v. License Appeal Comm'n*, 378 N.E.2d 1281, 1285-86 (Ill. App. Ct. 1978), the Illinois Supreme Court (post 1970) has yet to address the precise claim asserted by the Licensees. *Contrast Johnkol, Inc. v. License Appeal Comm'n*, 247 N.E.2d 901, 903-04 (Ill. 1969)(in case not involving local option provision, population classification under the Liquor Control Act was *invalid)* and *Shepard v. Illinois Liquor Control Comm'n*, 251 N.E.2d 206, 207-09 (Ill. 1969) (same) *with Anderson v. Nick*, 84 N.E.2d 394, 398-99 (Ill. 1949) (population classification under the Liquor Control Act's precinct-wide local option provision was valid); *see generally Lumpkin v. Cassidy*, 703 N.E.2d 1, 5 (Ill. 1998); *Best v. Taylor Machine Works*, 689 N.E.2d 1057, 1069 (Ill. 1998). Even in light of *Gorgees* and *Rincon* (and *Anderson*), it would still be incumbent on this court to predict how the Illinois Supreme Court would resolve the issue today. *See Allen v. Transamerica Ins. Co.*, 128 F.3d 462, 466 (7th Cir. 1997). The court declines to do so.

Thus, notwithstanding the possibility of abstention and the doctrine of constitutional avoidance, the court exercises its jurisdiction over the Licensees' § 1983 claims, and declines to exercise supplementary jurisdiction over their state law claim. *Cf. RAR, Inc.*, 107 F.3d at 1277 (in absence of Illinois case law on issue, stating hesitancy "to venture unguided into Illinois state constitutional law"); *United Beverage Co. of South Bend, Inc. v. Indiana Alcoholic Beverage Comm'n*, 760 F.2d 155, 157 (7th Cir. 1985) (declining to exercise jurisdiction over pendent state law claim after addressing federal constitutional claims); 28 U.S.C. §1367(c)(l) (stating that a district court may decline to exercise supplemental jurisdiction over a state law claim if "the claim raises a novel or complex issue of State law.").

B. Due Process

"The Fourteenth Amendment protects persons from state governmental deprivations of life, liberty, or property without due process of law." *Pro-Eco, Inc. v. Bd. of Commiss. of Jay County*, 57 F.3d 505, 512 (7th Cir. 1995). A procedural due process claim under the Fourteenth Amendment is brought pursuant to 42 U.S.C. § 1983, and "require[s] a two-step analysis." *Doherty v. City of Chicago*, 75 F.3d 318, 322 (7th Cir. 1996); *Kim Constr. Co. v. Bd. of Trustees of Village of Mundelein*, 14 F.3d 1243, 1245 (7th Cir. 1994); *Greco v. Guss*, 775 F.2d 161, 170 (7th Cir. 1985).[5] As a threshold inquiry, the court must determine whether an Illinois liquor license is a property interest; if that query is answered in the affirmative, the next step is to determine "what process is due." *Doherty*, 75 F.3d at 322. However, if the Licensees cannot establish that they have a property interest in their liquor licenses, their due process claims must fail. *See Kim Constr. Co.*, 14 F.3d at 1245; *Cornelius v. LaCroix*, 838 F.2d 207, 212 (7th Cir. 1988).

In its prior Opinion and Order, the court reviewed the language of the Liquor Control Act and cases from Illinois courts (federal and state) to determine whether N&N had made a sufficient showing, for purposes of a preliminary injunction, that it had a property interest in its liquor license. *See N&N Catering Co.*, 26 F. Supp.2d at 1071-77. From the outset, the court noted the continuing difference of opinion among Illinois courts as to whether a liquor license is a property interest or a mere "privilege." *See id.* at 1072; *see also Esmail v. Macrane*, 862 F. Supp. 217, 225 (N.D. Ill.

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[5] Some courts have presented the due process inquiry in three steps: (1) whether there was a property interest under the Fourteenth Amendment; (2) whether the alleged loss amounted to a deprivation; (3) whether that deprivation was without due process of law. *See Bayview-Lofberg's, Inc. v. City of Milwaukee*, 905 F.2d 142, 144 (7th Cir. 1990).

1994) (recognizing that "there appears to be some dispute as to whether a liquor license is a property right under Illinois law"), *rev'd on other grounds*, 53 F.3d 176 (7th Cir. 1995). Upon review of the relevant case law, the court expressed reservations as to whether N&N could ultimately show that it had a property interest in its Illinois liquor license. Nonetheless, the court found that there were at least arguable grounds indicating that N&N had such an interest. *See N&N Catering Co.*, 26 F. Supp.2d at 1076-77.

The court then concluded that N&N had met its burden with respect to the process prong of the due process inquiry. *See id.* at 1077-79. In doing so, the court primarily relied on *Philly's v. Byrne*, 732 F.2d 97, 92-93 (7th Cir. 1984) and 87 *South Rothschild Liquor Mart v. Kozubowski*, 752 F. Supp. 839, 842 (N.D. Ill. 1990). As discussed below, the Seventh Circuit in *Philly's* held that a referendum which prohibits the sale of liquor precinct-wide does not violate due process. *See* 732 F.2d at 92-93. The *Philly's* court reasoned that the "across the board" nature of a precinct-wide referendum was an adequate safeguard against arbitrary and adjudicative action by the electorate. *See id.* at 93. In *87 South Rothschild*, the court addressed a former version of the Liquor Control Act (1989) that allowed voters to ban the sale of alcohol at a "single establishment." 752 F. Supp. at 841, 842. Relying on *Philly's*, the court in *87 South Rothschild* declared the single establishment provision unconstitutional because the safeguard of a precinct-wide prohibition was missing. *See id.* at 842.

Though *Philly's* and *87 South Rothschild* are similar to the actions at bar, neither case affirmatively establishes that a licensee has a property interest in its liquor license. In fact, the court in *87 Rothschild* does not address the "property" prong in its due process analysis. Here, by contrast, the "property" prong is hotly-contested, and a resolution of that issue is required. The Licensees, however, have failed to

persuade the court to abandon its initial reservations on the existence of a property interest, and thus the court's final and conclusive determination is that the Licensees have failed to show that they have a property interest in their liquor licenses. Accordingly, the court need not reach the "process" prong of the due process analysis.

Although "property has never had a single, fixed meaning," *Patterson v. Portch*, 853 F.2d 1399, 1404 (7th Cir. 1988), the Seventh Circuit has articulated essentially the same test for determining whether a property interest exists for purposes of the Due Process Clause of the Fourteenth Amendment. See *Mid-American Waste Systems, Inc. v. City of Gary*, 49 F.3d 286, 289 (7th Cir. 1995); *Toulabi v. United States*, 875 F.2d 122, 125 (7th Cir. 1989); *Baja Contractors, Inc. v. City of Chicago*, 830 F.2d 667, 676 (7th Cir. 1987); *Scott*, 786 F.2d at 341; *Reed v. Village of Shorewood*, 704 F.2d 943, 948 (7th Cir. 1983). In short, Seventh Circuit cases addressing "property" under the Due Process Clause reflect "efforts to implement the conclusion in [*Board of Regents v.*] *Roth*, 408 U.S. 564, 577 (1972), that property depends on a legitimate claim of entitlement." *Mid-American Waste Systems, Inc.*, 49 F.3d at 289. In relevant part, the property inquiry articulated in *Roth* provides:

> To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate expectation of entitlement to it. . . .
>
> Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.

408 U.S. at 577. Although *Roth* instructs that the "underlying substantive interest is created by 'an independent source such as state law,' [it is] federal constitutional law [that] determines whether the interest rises to the level of a 'legitimate claim of entitlement.' " *Memphis Light, Gas and Water Division v. Craft*, 436 U.S. 1, 9 (1978). The court begins its inquiry with the state law at issue here—the Liquor Control Act.

The plain language of the Liquor Control Act would seem to solve the "liquor license as property" debate quite conclusively. *See* 235 ILCS 5/6-1. Indeed, the Liquor Control Act expressly states that a liquor license "shall not constitute property." *Id.* Further, by the terms of the Liquor Control Act, a liquor license lacks many of the typical attributes of property. *Id.* For instance, a liquor license cannot be transferred or sold, and it is site-specific, in that it "applies only to the premises described in the application and in the license issued thereon . . . ." 235 ILCS 5/7-14. The relevant portion of the Liquor Control Act is excerpted here:

> A license shall be purely a personal privilege, good for not to exceed one year after issuance . . . unless sooner revoked as in this Act provided, and shall not constitute property, nor shall it be subject to attachment, garnishment or execution, nor shall it be alienable or transferable . . . or subject to being encumbered or hypothecated. Such license shall not descend by the laws of testate or intestate devolution, but it shall cease upon the death of the licensee, provided that executors or administrators of the estate of any deceased licensee, and the trustee of any insolvent or bankrupt licensee, when such estate consists in part of alcoholic liquor, may continue the business . . . under order of the appropriate court, and . . . until the expiration of such license but not longer than six months after the death, bankruptcy or insolvency of such licensee.
>
> . . .

235 ILCS 5/6-1.

Additionally, the Liquor Control Act states the terms for renewal of a liquor license:

> Any licensee may renew his license at the expiration thereof, provided he is then qualified to receive a license and the premises for which such renewal license is sought are suitable for such purpose; and provided further that the renewal privilege herein provided for shall not be construed as a vested right which shall in any case prevent the city council or village president and board of trustees or county board, as the case may be, from decreasing the number of licenses to be issued within its jurisdiction.

Id.

Several courts, including this one, have relied upon the plain language of the Liquor Control Act to reject claims that a licensee has a property interest in its Illinois liquor license. *See Sapir v. City of Chicago*, 749 F. Supp. 187, 190 (N.D. Ill. 1990) (Norgle, J.); *Blue Cat Lounge, Inc. v. License Appeal Comm'n*, 667 N.E.2d 554, 557 (Ill. App. Ct. 1996); *Roach Enterprises v. License Appeal Comm'n*, 660 N.E.2d 276, 282 (Ill. App. Ct. 1996); *County of Cook v. Kontos*, 565 N.E.2d 249, 252 (Ill. App. Ct. 1990); *Ole, Ole, Inc. v. Kozubowski*, 543 N.E.2d 178, 181 (Ill. App. Ct. 1989); *Ross v. Kozubowski*, 538 N.E.2d 623, 626 (Ill. App. Ct. 1989); *Black Knight Restaurant, Inc. v. City of Oak Forest*, 513 N.E.2d 109, 111 (Ill. App. Ct. 1987); *Two Kats, Inc. v. Village of Chicago Ridge*, 497 N.E.2d 1314, 1315 (Ill. App. Ct. 1986); *City of Wyoming v. Liquor Control Comm'n of Illinois*, 362 N.E.2d 1080, 1083 (Ill. App. Ct. 1977). And other courts have relied on Illinois common law to reject the argument that an Illinois liquor license is property. *See Great Atlantic & Pacific Tea Co. v. Mayor and Commissioners of Danville*, 11 N.E.2d 388, 392 (Ill. 1937) ("The right to engage in the liquor traffic is not an inalienable right guarded by the

organic law."); *People v. McBride*, 84 N.E. 865 (Ill. 1908) (stating that licenses to sell liquor create no vested rights and "are merely temporary permits to do what would otherwise be an offense against the law . . . ."); *Duncan v. Marcin*, 403 N.E.2d 653, 656 (Ill. App. Ct. 1980); *Huguley v. Marcin*, 349 N.E.2d 564, 566 (Ill. App. Ct. 1976); *Malito v. Marcin*, 303 N.E.2d 262, 265 (Ill. App. Ct. 1973); *Maywood Proviso State Bank v. City of Oakbrook Terrace*, 214 N.E.2d 582, 586 (Ill. App. Ct. 1966).

Most relevant to this court's property inquiry, however, are two cases from the Seventh Circuit that have addressed a licensee's alleged property rights under the Liquor Control Act: (1) *Philly's v. Byrne*, *supra;* and (2) *Reed v. Village of Shorewood*, 704 F.2d 843, 948-49 (7th Cir. 1983). In each of these cases, the Seventh Circuit declined (either expressly or implicitly) to find the above section of the Liquor Control Act, 235 ILCS 5/6-1, controlling as to whether a liquor license is property for purposes of the Due Process Clause. Moreover, both cases largely dismiss without comment the several Illinois cases that reject the assertion that a liquor license is property.[6]

In its prior Opinion and Order, the court closely examined the Seventh Circuit's reasoning in *Philly's* and *Reed*. Though neither case is directly on point (*Philly's* is close), each provides insightful analysis that in large part, if not entirely,

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[6] Three additional notes: (1) the *Philly's* court refers to the line of Illinois cases only in passing, *see* 732 F.2d at 89; (2) the *Reed* court did refer to one of those cases, *City of Wyoming v. Liquor Control Commission of Illinois*, 362 N.E.2d 1080, 1084 (Ill. App. Ct. 1977), but relied on it for a different proposition, *see* 704 F.2d at 949; (3) the Illinois Appellate Court has criticized the "liquor license as property" analysis in *Reed*, *see Black Knight Restaurant*, 513 N.E.2d at 111 ("In our view, [*Reed*] directly contradicts controlling Illinois law, and we decline to follow it as precedent.").

controls the outcome here. Additionally, the parties vigorously contest each case's application to the facts at bar. It is therefore necessary to re-examine *Philly's* and *Reed*, beginning with the earlier case, *Reed*.

Reed v. Village of Shorewood

In *Reed*, officials of the Village of Shorewood, Illinois, employed various, questionable tactics as they attempted to strip the plaintiffs of their Illinois liquor license. *See* 704 F.2d at 947. Before the officials began implementing these tactics, the plaintiffs were able to renew their liquor license for three years. At some point, however, the village (through its officials) began a campaign of harassment against the plaintiffs, which included customer arrests and groundless allegations of liquor ordinance violations. After the limited success of those tactics, the village passed an ordinance which reduced the number of liquor licenses available and informed the plaintiffs that their liquor license would not be renewed. The Illinois Liquor Control Commission reversed and remanded, holding that the plaintiffs were entitled to a hearing before a decision was made not to renew. Unswayed, the village ignored the directive for a hearing and revoked the plaintiffs' liquor license on trumped-up charges. Again, the Illinois Liquor Control Commission reversed. Later, the village again refused to renew the plaintiffs' license without a hearing, and were again reversed. Nonetheless, the village was successful in wearing down the plaintiffs to the point where the plaintiffs eventually closed their watering-hole and surrendered their license. *See id.*

The plaintiffs then filed suit, alleging that the village and its officials "interfered with and eventually destroyed their business, in violation of the due process clause of the Fourteenth Amendment." *Id.* Of particular note was the plaintiffs' allegation that the defendants "wait[ed] for the license to expire and then refuse[d] to issue a renewal license." *Id.* at 949 (brackets in original). The district court

dismissed the suit without addressing whether the plaintiffs' liquor license was property, instead holding that there was no actual deprivation by the village and its officials. *See id.*

On appeal, the Seventh Circuit discussed whether an Illinois liquor license is property for purposes of the Fourteenth Amendment. *See id.* at 948. At the outset, the court noted that since the Supreme Court's decision in *Roth*, state law provided the answer to that inquiry. *See id.* The *Reed* court, however, rejected the seemingly "inescapable" conclusion that the state law apparently on point here, *i.e.* the Liquor Control Act's statement that a liquor license is "purely a personal privilege . . . and shall not constitute property," is controlling for due process purposes. *See Reed*, 704 F.2d at 948 (*citing* Ill. Rev. Stat. 1981, ch. 43, ¶ 119).[7] Specifically, the court remarked that "'[p]roperty' in the Illinois Liquor Control Act need not mean the same thing as 'property' in the due process clause." *Id.* (*citing Perry v. Sindermann*, 408 U.S. 593 (1972)). The court explained that while Illinois liquor licenses lack some of the typical attributes of property, *e.g.*, they cannot be sold or bequeathed, "this does not mean they are not property in a due process clause sense." *Id.* Thus, according to the court, "The statement that a liquor license is not property may have been intended just to emphasize these limitations . . . ." *Id.*

Therefore, the *Reed* court stated that it "must look beyond labels . . . and decide whether the plaintiffs' license was 'property' in the functional sense." *Id.* Accordingly, the court posed the dispositive question as "whether under Illinois law a liquor license is securably and durably the licensee's" as

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[7] As noted above, that statement is now included in 235 ILCS 5/6-1, which was formerly cited as Ill. Rev. Stat. 1981, ch. 43, ¶ 119. The parties have not identified any material change that the provision has undergone since 1981.

opposed to "what you hold subject to so many conditions as to make your interest meager, transitory, or uncertain." *Id.*

The court answered the former query in the affirmative. *See id.* First, the court reasoned that an Illinois liquor license "is good for one year and during that time, clearly, it is securely held, for it can be revoked only for cause, after notice and hearing, and subject to judicial review." *Id.* (*citing* Ill. Rev. Stat. 1981, ch. 43, ¶¶ 149, 153 [now 235 ILCS 5/7-5, 5/7-9]). According to the court, "These are the same conditions under which a teacher's tenure, a form of property under the Fourteenth Amendment, can be revoked." Id. (referring to *Perry).*

Second, the court examined the criteria for renewal of a liquor license as provided in the Liquor Control Act, Ill. Rev. Stat. 1981, ch. 43, ¶ 119 [now 235 ILCS 5/6-1]. *See id.* at 948-49. After noting that the Liquor Control Act does not provide equivalent protections for nonrenewal as revocation, the court found that the "criteria for renewal of a [liquor] license are undemanding, which suggests that the Illinois legislature expected most licenses to be renewed as a matter of course." *Id.* The court then determined that nonrenewal could be equated with revocation, meaning that the same statutory safeguards against arbitrary revocation were required for arbitrary nonrenewal. *See id.* at 949. In support thereof, the court relied on the following passage from *City of Wyoming v. Liquor Control Comm'n*, 362 N.E.2d 1080, 1084 (Ill. App. Ct. 1977):

> [I]t could not have been the legislative intent that a liquor control commissioner be able to easily avoid the application of the statutory procedural requirements to license revocation by waiting for the license to expire and then refuse to issue a renewal license. For that reason, we interpret the term 'revocation' [in Ill. Rev. Stat. 1981, ch. 43, ¶ 149, now 235 ILCS 5/7-5] to include the refusal to issue a renewal license.

Id. The court deemed this passage as standing for the principle "that you may not do indirectly by nonrenewal what you could not do directly by revocation." *Id.* In doing so, the court also rejected the express language in the Liquor Control Act, Ill. Rev. Stat. 1981, ch. 43, ¶ 119 [now 235 ILCS 5/6- 1], that provides that renewal is not a "vested right." *See id.*

As for the case before it, the court iterated the plaintiffs' allegation that the village "wait[ed] for the license to expire and then refuse[d] to issue a renewal license." *Id.* And under the court's extensive analysis, "if true this entitled [the plaintiffs] . . . to all the protections, procedural and substantive, of the revocation process, thus making their interest in renewal a property right for purposes of the Fourteenth Amendment." *Id.* That is the holding of *Reed.*

Philly's v. Byrne

The court now turns to *Philly's*, a case comparable to the instant actions because it addressed the constitutionality of a precinct-wide local option referendum under the Liquor Control Act. In *Philly's*, a Chicago restaurant lost its liquor license as a result of a referendum banning the sale of alcohol throughout the entire, surrounding precinct. *See* 732 F.2d at 89. The restaurant then filed suit, alleging that "the operation of Illinois' local-option liquor law . . . allow[ing] the voters in a precinct to vote the precinct dry, deprived [them] of property without due process of law . . . ." *Id.* For reasons not reiterated in the Seventh Circuit's opinion, the district court dismissed the action on summary judgment. *See id.*

The Seventh Circuit affirmed, holding that a referendum which prohibits the sale of liquor precinct-wide does not violate due process. *See id.* at 92-93. Because the court ultimately concluded that the local option referendum satisfied the process prong of the due process inquiry, it expressly declined to decide whether a liquor license is property in these circumstances. *See id.* at 91. Before

refraining from this determination, however, the court re-examined the "liquor license as property" issue. *See id.* at 90-91.

Although the court characterized *Reed* as holding that an Illinois liquor license is property within the meaning of the Fourteenth Amendment, *see id.* at 90 (*citing Reed*, 704 F.2d at 948-49), it opined that to determine whether an Illinois liquor license is property, an inquiry into "the precise dimensions of the right" is also required. *Id.* The court deemed the expiration date of the liquor license as one of these dimensions, commenting:

> Every liquor license in Illinois has a variable expiration date: either the date stamped on the license or the date on which the licensee is required to surrender the license because the precinct where the licensed premises are located has voted to go dry—whichever is earlier. Just as a tenant is not deprived of a property right when he is ejected from the premises at the expiration of his lease, so it can be argued that when a precinct votes itself dry any liquor licensees' property rights are extinguished by the terms of the licenses.

Id. at 90-91. The court, however, distinguished this argument from the situation where "a condition that limits a property right infringes a constitutional liberty." *Id.* at 91. An example of such a case, the court explained, would be "if. . . liquor licenses expired by their terms when the licensee criticized the Liquor Control Commission." *Id.* In that scenario, "there would be a deprivation of liberty [of expression]." *Id.* But, the court noted, "a referendum does not invade any constitutional liberty." *Id.*

While making this distinction, the court stopped short of endorsing the argument that a licensee's "property rights [could be] extinguished by the terms of the licenses." The court explained that in at least one instance such an argument

would potentially allow states to circumvent due process. *See id.* The court gave the following example:

> If Illinois provided that a liquor license could be taken away only for cause but cause as determined by the Liquor Control Commission without any notice to the licensee or opportunity for a hearing, the state could argue that this was simply a condition, not unlawful in itself (for there is not a general constitutional requirement that government act only after notice and hearing), that limited the right.

Id. Thus, "[t]he holder of the right could complain only if the procedures of the state prescribed, however meager, were not followed." *Id.*

The court noted that this approach, while endorsed in some legal circles, "is not yet law." *Id.* (citations omitted). Returning to the issue at bar, the court remarked, "Maybe the parallel argument that a liquor licensee's rights are merely conditional on the voters' not voting the precinct dry also fails." *Id.* And that is the end of the "property" analysis in *Philly's*, as the court declined to provide a conclusion on the "liquor license as property" issue. *See id.*

Though *Reed* and *Philly's* discuss extensively whether an Illinois liquor license is property, they do not resolve the issue conclusively. On the one hand, the answer seems clear because *Reed* holds that a licensee has a property interest under the Fourteenth Amendment in the renewal of its license. *See* 704 F.2d at 949. The Licensees argue that the holding in *Reed* is easily extended to a case where a local option referendum is at issue, and, a la *Reed*, they equate a prohibitive referendum with statutory revocation. According to the Licensees, "[t]o say . . . that *Reed* only applies to the renewal right would be to read its holding and, as importantly, its reasoning, too narrowly; for it would defy common sense, let alone longstanding principles of constitutional law, that a licensee could have a property

interest in the renewal of a license, but not in the underlying license itself, merely because the legislature labeled the license a privilege." (Licensees' Supp. Mem. at 12.) That argument carries weight, as later Seventh Circuit cases interpret *Reed* as holding that an Illinois liquor license is property under the Fourteenth Amendment—period. *See Kelly v. City of Chicago*, 4 F.3d 509, 511 (7th Cir. 1993) (stating in passing that under *Reed*, "a liquor license constitutes property for purposes of the Fourteenth Amendment"); *Philly's* 732 F.2d at 90 (arguably citing *Reed* as establishing that a liquor license is always property); *see also 87 South Rothschild Liquor Mart*, 752 F. Supp. at 842 (implicit in decision declaring Liquor Control Act's single establishment provision unconstitutional on due process grounds is that Illinois liquor license is property). This would seem to end the "liquor license as property" debate.

On the other hand, the *Philly's* court arguably re-opened the debate by reiterating the instruction from *Roth* that the property inquiry also depends "on the precise dimensions of the right." *Philly's*, 732 F.2d at 90. If as the Licensees urge, *Reed* conclusively established that a liquor license was property for seemingly all purposes, then a legitimate question is why the *Philly's* court readdressed the issue. Perhaps one obvious reason is that the facts in *Philly's* were distinguishable from those in *Reed*. And for purposes here, *Philly's*, unlike *Reed*, involved facts comparable to the ones at bar. That is, *Philly's* involved the loss of a liquor license via a local option referendum rather than the unexpected nonrenewal, and thus statutory revocation, of a license. Therefore, the court is not convinced that *Reed's* "liquor license as property" determination controls here. *See Wilcox v. Miller*, 89 C 20053, 1990 WL 304268, at *3 (N.D. Ill. Nov. 6, 1990) (construing *Reed* to state that the *expectation of renewal* "creates a 'vested right' in [an Illinois liquor license]" thereby requiring due process protection).

The most relevant instruction from *Philly's* is where the court deemed a local option referendum as providing a potential expiration date for a liquor license. *See* 732 F.2d at 90-91. According to the *Philly's* court, this potential expiration date is one of "the precise dimensions of the right" accompanying the possession of a liquor license. *Id.* Although the *Philly's* court declined to reach a conclusion on these grounds, it did not outright reject the argument that a licensee's supposed property rights are conditional on the expiration date of its license. In fact, this view is supported by Judge Wood's concurring opinion in *Philly's*, in which he stated:

> While Justice Holmes' assertion in *Rippey [v. Texas.* 193 U.S. 504, 509-10 (1904)], that the power to prohibit includes the power to prohibit conditionally, has proven overbroad in other contexts, the holding of the case remains in force in the context of a local option provision of an otherwise constitutional legislative enactment such as a prohibition on the sale of liquor under the unique aegis of the twenty-first amendment.

732 F.2d at 94.

Similarly, in a case addressing the revocation of a license to sell guns under Wisconsin law, the Seventh Circuit endorsed the argument, stating that "[a] license to operate a business is [held securely by the licensee and is] therefore property if it cannot be taken away from the holder before the end of a *definite* period without proof of misconduct on his part, so that if he keeps out of trouble he knows he can hold on to the license for that period." *Baer v. City of Wauwatosa*, 716 F.2d 1117, 1122 (7th Cir. 1983) (emphasis added) (*citing Reed*, 704 F.2d at 948-49) (other citations omitted). The *Baer* court stated further that the plaintiff's right to sell guns "was conferred by the license, and if [the plaintiff] had no expectation reasonably grounded in law that he would be able to retain the license for a *fixed term* during good behavior, he

was not deprived of property." *Id.* (emphasis added); *see also National Paint & Coatings Assoc. v. City of Chicago*, 45 F.3d 1124, 1129 (7th Cir. 1995)("[T]he people, directly or through their legislature, may alter the substantive terms of the promise not to interfere in private economic transactions.") (*citing Philly's); Doe v. Edgar*, 721 F.2d 619, 624 (7th Cir. 1983) (Once an "individual loses his [driver's] pursuant to a valid conviction and he exhausts his administrative remedies, his property interest in that license terminates.").

The court finds the property analysis from *Baer* dispositive here. Via the local option provision of the Liquor Control Act, the term of a liquor license is indefinite, thereby indicating that a licensee's interest is "meager, transitory, or uncertain." In other words, the ever-present possibility of an Illinois liquor license expiring on an indefinite date (despite the one-year term otherwise provided) via a local option referendum indicates that it is not "securably and durably the licensee's"—the standard articulated in *Reed*. Indeed, while the Licensees, like the plaintiffs in *Reed*, had a legitimate expectation via the Liquor Control Act that their licenses would be renewed administratively as a matter of course, they were also on notice under the statute that their licenses may expire by the discretion of the electorate (the statute uses the term "void"). This notice of potential expiration by referendum therefore negates any "legitimate claim of entitlement" that a licensee would assert in its license. See *Border v. City of Crystal Lake*, 75 F.3d 270, 273 (7th Cir. 1996) ("A person's interest in a benefit . . . constitutes 'property' for due process purposes only if 'there is are such rules or mutually explicit understandings that support his claim of entitlement to the benefit.' ") (*quoting Perry*, 408 U.S. at 601); *National Paint*, 45 F.3d at 1129 ("A license is nothing but a promise by the issuing body not to interfere in business according to its terms"); *cf. Ross v. City of Chicago*, 89 C 8049, 1990 WL 37770, at *3 (N.D. Ill. March 22, 1990)

(no unconstitutional taking where local option referendum voided liquor license because the plaintiff "operated his liquor store with the knowledge that a local referendum could take away his liquor license at any time."); *People v. McBride*, 84 N.E. 865, 872 (Ill. 1908) (license not property where license "stated on its face that it was subject to all the laws of the state."); *M&F Supermarket. Inc. v. Owens*, 997 F. Supp. 908, 913 (S.D. Ohio 1997) (local option referendum did not violate plaintiff's substantive due process rights because plaintiffs "knew or should have known that the citizens had this option under the laws of the State of Ohio."); *Scioto Trails Co. v. Ohio Dept. of Liquor Control*, 462 N.E.2d 1386, 1388-92 (Ohio Ct. App. 1983) (no due process violation where licensee held liquor license subject to the exercise of the statutory right of a local option election).

The Licensees nevertheless argue that they had a legitimate expectation in the continued validity of their licenses because the history of the Liquor Control Act, going back to its original enactment in 1934 and including its review in *Philly's* and *87 South Rothschild Liquor Mart*, "makes clear the fact that licensees have, and had, an equal right to expect that any "dry" vote would only be precinct-wide . . ." (Licensees' Supp. Mem. at 16.) (*citing Philly's*, 732 F.2d at 92-93 and 87 *South Rothschild Liquor Mart*, 752 F. Supp. at 842). Thus, according to the Licensees, their "true expectation . . . is that any threat of a local option referendum would solely be across the board, thus furnishing them with a permissible substitute safeguard against an unconstitutional taking." *Id.* This expectation, however, does not derive from the language of the Liquor Control Act, and is therefore nothing more than a unilateral expectation of entitlement. *See Cornelius v. LaCroix*, 838 F.2d 207, 211 (7th Cir. 1988) (rejecting argument that legitimate claim of entitlement arose from past contracts); *Szabo Food Serv. Inc. v. Canteen Corp.*,

823 F.2d 1073, 1080 (7th Cir. 1987)("A person has a 'property interest in an expectation of renewal only if state law so provides."). And as noted above, neither *Philly's* nor *87 South Rothschild Liquor Mart* conclusively establishes that a licensee has a property interest in its license. Moreover, the Licensee's attempt to distinguish a precinct-wide referendum from a single-address referendum (for purposes of the property inquiry) is not persuasive.[8]

In sum, a unilateral claim of entitlement, as the Licensees have here, simply does not suffice for purposes of establishing that they have a property interest in the continued validity of their liquor licenses. *See Roth*, 408 U.S. at 576-77; *River Park, Inc. v. City of Highland Park*, 23 F.3d 164, 165 (7th Cir. 1994); *Wallace v. Robinson*, 940 F.2d 243, 246 (7th Cir. 1991); *Dziewior v. City of Marengo*, 715 F. Supp. 1416, 1418 (N.D. Ill. 1989); *cf. Marusic Liquors, Inc. v. Daley*, 55 F.3d 258, 262 (7th Cir. 1995) (plaintiff misunderstood the nature of a license in a system of regulation where he depicted it "as a kind of property that the state must respect and the privileges of which it may not change."). Because the Licensees have failed to show that they have a property interest in their liquor licenses, their due process claim must fail. Therefore, the court concludes that the local option

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[8] Additionally, the Licensees (notwithstanding that N&N and Club Misty are corporations) have not shown that the "continued possession [of their liquor licenses is] essential in the pursuit of a livelihood." *Bell v. Burson*, 402 U.S. 535, 539 (1971); *Scott*, 786 F.2d at 341; *cf. Nat'l Paint & Coatings*, 45 F.3d at 1129-30 (discussing substantive due process). The *Bell* court stated that "[i]n such cases . . . licenses are not to be taken away without that procedural due process required by the Fourteenth Amendment." *Id. But cf. Hawkins v. Agric. Marketing Service*, 10 F.3d 1125, 1133 (5th Cir. 1993) ("The Constitution does not guarantee an unrestricted privilege to engage in a particular profession or a privilege to conduct a business as one pleases.").

provision of the Liquor Control Act does not violate the Due Process Clause of the Fourteenth Amendment.[9]

C. Bill of Attainder

Next, the court addresses the Licensees' claim that the local option provision allowing single-address referenda under the Liquor Control Act, 235 ILCS 5/9-2, amounts to a bill of attainder in violation of the U.S. Constitution.

The Constitution provides that "[n]o State shall . . . pass any Bill of Attainder." *See* U.S. Const. Art. I, § 10, cl. 1; *see also* U.S. Const. Art. I, § 9, cl. 3 (applied to the federal government). "The Supreme Court has defined a bill of attainder as 'a law that legislatively determines guilt and inflicts punishment upon an identifiable individual without provision of the protections of a judicial trial.'" *Dehainaut v. Pena*, 32 F.3d 1066, 1070 (7th Cir. 1994) (*quoting Selective Ser. Sys. v. Minn. Public Int. Research*, 468 U.S. 841, 847 (1984)); *see also Nixon v. Administrator of Gen. Services*, 433 U.S. 425, 468 (1977); *United States v. Brown*, 381 U.S. 437, 445 (1965); *United States v. Lovett*, 328 U.S. 303, 315-16 (1946). Likewise, "[t]he singling out of an individual for legislatively prescribed punishment constitutes an attainder whether the individual is called by name or described in terms of conduct which, because it is past conduct, operates only as a designation of particular persons." *Communist Party of the United States v. Subversive Activities Control Bd.*, 367 U.S. 1, 86 (1961). However, the prohibition against bills of attainder "surely was not intended to serve as a variant of the equal

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[9] For excellent discussions on whether a liquor license is entitled to constitutional protection as a property interest, see Shelly Ross Saxer, *License to Sell: Constitutional Protection Against State or Local Government Regulation of Liquor Licensing*, 22 Hastings Const. L.Q. 441 (Winter 1995) and Linda L. Munden, *Retail Liquor Licenses and Due Process: The Creation of Property Through Regulation*, 32 Emory L.J. 1199 (Fall 1983).

protection doctrine, invalidating every Act of Congress or the States that legislatively burdens some persons or groups but not other plausible individuals." *Nixon*, 433 U.S. at 477; *see also Falls v. Town of Dyer, Ind.*, 875 F.2d 146, 148 (7th Cir. 1989) ("Our Constitution requires neither perfection nor comprehensive regulation."); *Song v. City of Elyria, Ohio*, 985 F.2d 840, 844 (6th Cir. 1993); *cf. River Park, Inc.*, 23 F.3d at 167 ("Federal litigation is not a *repêhcage* round for losers of earlier contests. . . .").

The Licensees bear a heavy burden in seeking to have the Liquor Control Act declared a bill of attainder, as "only clearest proof suffices to establish unconstitutionality of a statute on such a ground." *Communist Party of the United States*, 367 U.S. at 83 (*quoting Flemming v. Nestor*, 363 U.S. 603, 617 (1960)); *see also Kerr-McGee Chemical Corp. v. Edgar*, 837 F. Supp. 927, 935 (N.D. Ill. 1993). To carry their burden, the Licensees must show that the Liquor Control Act has three attributes: "(1) specification of the affected persons; (2) punishment; and (3) lack of a judicial trial." *Dehainaut*, 32 F.3d at 1070. Because the "lack of a judicial trial" element is not at issue, the court limits its discussion to the remaining two elements, "specification of the affected persons" and "punishment."

With respect to the specificity element, the Licensees argue that "[t]he referendum that appears on the ballot specifies a particular licensed establishment which alone is affected by the vote to revoke its license." (Licensees' Supp. Mem. at 37.) Thus, the Licensees attack the Liquor Control Act at the referendum level rather than the terms of the statute itself. *Compare City of Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668, 672-79 (1976) (rejecting a due process challenge to a zoning referendum) *with Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 295 (1981) ("It is irrelevant that the voters rather than a legislative body [adopted the measure], because voters may no more violate

the Constitution by enacting a ballot measure than a legislative body may do so by enacting legislation."). Though the Licensees" argument carries weight, the contravening argument is that where a statute is attacked as a bill of attainder, the focus is on its terms, and whether *those* terms either explicitly or as applied specify (and punish) an individual or group. *Cf. Pro-Eco, Inc. v. Bd. Of Comm. Of Jay County, Ind.*, 57 F.3d 505, 513 n.9 (7th Cir. 1995) ("If an ordinance professed general applicability, but it were so specific in describing the prohibited acts that only one actor could ever come within its purview, the ordinance might amount to a bill of attainder . . . ."); *Coniston Corp. v. Village of Hoffman Estates*, 844 F.2d 461, 469 (7th Cir. 1988). *But cf Philly's*, 732 F.2d at 93; *United Beverage Co. of South Bend, Inc.*, 760 F.2d at 159.

Assuming that the proper focus is on the actual terms of the enabling statute, the Liquor Control Act lacks such specificity. Although the Liquor Control Act provides for single-address referenda, its terms do not identify any particular licensee by name or otherwise. Put simply, the single-address provision applies generally to all current and potential liquor licensees in the City of Chicago. *Contrast Brown*, 381 U.S. at 450 (federal statute limiting eligibility for union office "designated in no uncertain terms" the characteristics of communists). Indeed, the city-wide addresses of the Licensees reflect the general application of the statute. Moreover, the only common characteristic that the Licensees have shown is that each holds a liquor license. Finally, their mere number also weighs against finding an unconstitutional "class of one." *See Coniston Corp.*, 844 F.2d at 469 (stating that "where the class has only one member, we have the bill of attainder."). In any event, the court's bill of attainder analysis does not rest on whether the "specificity" element has been satisfied.

Even if the focus were on particular referenda and the Licensees demonstrated "specificity," they nevertheless fail to show that the Liquor Control Act, via its provision for single address referenda, is punitive. To determine whether a statute inflicts punishment, the court must make three inquiries: "(1) whether the challenged statute falls within the historical meaning of legislative punishment; (2) whether the statute 'viewed in terms of the type and severity of burdens imposed, reasonably can be said to further nonpunitive legislative purposes'; and (3) whether the legislative record 'evinces a [legislative] intent to punish." *Selective Serv. Sys. v. Minn. Public Int. Research*, 468 U.S. at 852 (*quoting Nixon*, 433 U.S. at 475-76, 478); *see also Dehainaut*, 32 F.3d at 1071.

From a historical perspective, the single-address provision of the Liquor Control Act does not fall within the meaning of punishment. In this country, the punishments forbidden by the Bill of Attainder Clause have expanded beyond the prohibition's English origin, namely death sentences, "to include legislative bars to participation by individuals or groups in specific employments or professions." *Selective Serv. Sys.*, 468 U.S. at 852; *see also Nixon*, 433 U.S. at 473-74. In conclusory fashion, the Licensees contend that the loss of their licenses falls within this ambit of punishment. (*See* Licensees' Supp. Mem. at 34-35) ("There is no doubt, then, that the legislative revocation of a specific individual's license qualifies as the kind of punitive measure governed by the Bill of Attainder Clause."). As the brevity of the Licensees' argument implies, there is simply no basis to deem the loss of a liquor license as punishment in the historical sense. Further, the Licensees do not attempt to show that the loss of their licenses bars them from participation in specific employment; nor do they attempt to compare their predicament with instances where punishment was found. *See e.g.*, Nixon, 433 U.S. at 474-75 (citing cases). In short,

"[f]orbidden punishment is not involved merely because [a statute] imposes burdensome consequences." *Id.* at 472.

Moreover, the court finds that the single-address provision of the Liquor Control Act furthers a nonpunitive legislative purpose. As discussed at the outset of the court's analysis, states have an important interest, and wide latitude in exercising their police powers to control the sale of liquor. That interest is evident in the plain language of the Liquor Control Act, which states:

> This Act shall be liberally construed, to the end that the health, safety and welfare of the People of the State of Illinois shall be protected and temperance in the consumption of alcoholic liquors shall be fostered and promoted by sound and careful control and regulation of the manufacture, sale and distribution of alcoholic liquors.

235 ILCS 5/1-2; *cf. Kerr-McGee Chem. Corp.*, 837 F. Supp. at 936 (referring to the purpose of the statute at issue). And that legitimate interest is most apparent when the electorate votes in a referendum on whether to prohibit the sale of alcohol. *See Philly's*, 732 F.2d at 92 ("It has seemed best in default of consensus to leave the matter [of alcohol sales] to local preference as expressed in the voting booth."). Simply put, the "the restriction [on the Licensees] comes about as a relevant incident to [the] regulation" of alcohol. *Dehainaut*, 32 F.3d at 1071 (citation and internal quotation marks omitted).

The court's final inquiry into whether the challenged enactment inflicts punishment is "whether the legislative . . . record as a whole evinces an intent to punish." *Dehainaut*, 32 F.3d at 1072. The Licensees must present "unmistakable evidence of punitive intent' before an enactment may be invalidated on this basis." *Id.* (citations omitted). Thus, even "several isolated statements" by legislators will not suffice. *Id.*

On this prong, the Licensees' evidence consists of one such isolated statement. To wit, a legislator commented that single-address referenda "will not penalize the good licenses . . . but only target that bad operator." (Licensees' Supp. Mem. at 37.) That statement, however, does not refer to a specific licensee. And in any event, the court declines to infer punitive intent in the absence of additional evidence. Finally, the court rejects the Licensees' argument that statements in the legislative history directed at the anti-social consequences of alcohol consumption are probative of punitive intent; such statements instead reflect the purpose of the legislation.

In sum, the Licensees have failed to show that the single-address provision of the Liquor Control Act constitutes punishment. Therefore, the court concludes that the Liquor Control Act is not a bill of attainder in violation of the United States Constitution.

III. CONCLUSION

For the foregoing reasons, the court concludes that the Licensees have failed to show that the Liquor Control Act violates the Due Process Clause or the Bill of Attainder Clause of the United States Constitution. The court declines to exercise supplemental jurisdiction over the Licensees' claim that the Liquor Control Act violates the Special Legislation Clause of the 1970 Illinois Constitution.

IT IS SO ORDERED.

ENTER:

/s/ Charles Ronald Norgle, S.R.
CHARLES RONALD NORGLE S.R., Judge
United States District Court

DATED: 2-17-99

APPENDIX C

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

May 25, 2000

Nos. 99-1597 & 99-1628

CLUB MISTY, INCORPORATED, doing business as TEQUILA ROADHOUSE, an Illinois corporation and ALBERTO BEDOYA, doing business as CASANOVA'S, INCORPORATED,
Plaintiffs-Appellants,

v.

JAMES LASKI, Clerk of the City of Chicago, BOARD OF ELECTION COMMISSIONERS OF THE CITY OF CHICAGO, CITY OF CHICAGO, a municipal corporation, *et al.*,
Defendants-Appellees.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.

Nos. 98 C 8054 & 98 C 7831
CHARLES R. NORGLE, *Judge*.

Before HON. RICHARD A. POSNER, *Chief Circuit Judge*, HON. WILLIAM J. BAUER, *Circuit Judge*, HON. DANIEL A. MANION, *Circuit Judge*.

ORDER

On April 25, 2000, defendants-appellees filed a petition for rehearing and petition for rehearing *en banc* and on May 10, 2000 plaintiffs-appellants filed an answer. A vote of the panel and active members of the Court* was requested, and a majority of the judges voted to deny a rehearing *en banc*.** The petition is therefore DENIED.

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* Hon. Joel M. Flaum did not participate in the consideration of the petition.

** Hon. William J. Bauer and Hon. Michael S. Kanne voted to grant the petition for rehearing *en banc*.

APPENDIX D

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

Date: April 3, 2000

Nos. 99-1597 and 99-1628

CLUB MISTY, INCORPORATED, doing business as TEQUILA ROADHOUSE, an Illinois Corporation, *et al.*,
Plaintiffs-Appellants,

v.

JAMES LASKI, Clerk of the City of Chicago, *et al.*,
Defendants-Appellees.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division

Nos. 98 C 7831 and 98 C 8054
CHARLES R. NORGLE, *Judge*

BEFORE: HONORABLE RICHARD A. POSNER, *Chief Judge*, HONORABLE WILLIAM J. BAUER, *Circuit Judge*, HONORABLE DANIEL A. MANION, *Circuit Judge*.

JUDGMENT—WITH ORAL ARGUMENT

The judgment of the District Court is REVERSED, with costs, in accordance with the decision of this court entered on this date.

APPENDIX E

UNITED STATES DISTRICT COURT
Northern District of Illinois
Eastern Division

Case Number: 98 C 7831

N & N CATERING, *et al.*

v.

CITY OF CHICAGO, *et al.*

JUDGMENT IN A CIVIL CASE

□ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury rendered its verdict.

■ Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS HEREBY ORDERED AND ADJUDGED that judgment is entered in favor of Defendants and against Plaintiff on Plaintiffs' Complaint for declaratory judgment.

MICHAEL W. DOBBINS, Clerk of Court

/s/ Eric W. Fulbright,
ERIC W. FULBRIGHT
Deputy Clerk

Date: 2/17/1999

UNITED STATES DISTRICT COURT
Northern District of Illinois
Eastern Division

Case Number: 98 C 8054

N & N CATERING, *et al.*

v.

CITY OF CHICAGO, *et al.*

JUDGMENT IN A CIVIL CASE

□ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury rendered its verdict.

■ Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS HEREBY ORDERED AND ADJUDGED that judgment is entered in favor of Defendants and against Plaintiff on Plaintiffs' Complaint for declaratory judgment.

MICHAEL W. DOBBINS, Clerk of Court

/s/ Eric W. Fulbright,
ERIC W. FULBRIGHT
Deputy Clerk

Date: 2/17/1999

APPENDIX F

5/9-2. Referendum on retail sales of alcoholic liquor—Petition—Procedure

§ 9-2. When any legal voters of a precinct in any city, village or incorporated town of more than 200,000 inhabitants, as determined by the last preceding Federal census, desire to pass upon the question of whether the sale at retail of alcoholic liquor shall be prohibited in the precinct or at a particular street address within the precinct, they shall, at least 90 days before an election, file in the office of the clerk of such city, village or incorporated town, a petition directed to the clerk, containing the signatures of not less than 25% of the legal voters registered with the board of election commissioners or county clerk, as the case may be, from the precinct. Provided, however, that when the petition seeks to prohibit the sale at retail of alcoholic liquor at a particular street address of a licensed establishment within the precinct the petition shall contain the signatures of not less than 40% of the legal voters requested from that precinct. The petition shall request that the proposition "Shall the sale at retail of alcoholic liquor be prohibited in (or at). . . . ?" be submitted to the voters of the precinct at the next ensuing election at which such proposition may be voted upon. The submission of the question to the voters of such precinct at such election shall be mandatory when the petition has been filed in proper form with the clerk. If more than one set of petitions are presented to the clerk for submission at the same election, the petition presented first shall be given preference; however, the clerk shall provisionally accept any other set of petitions setting forth the same (or substantially the same) proposition. If the first set of petitions for a proposition is found to be in proper form and is not found to be invalid, it shall be accepted by the clerk and all provisionally accepted sets of petitions setting forth the same (or substantially the same) proposition shall be rejected by the clerk. If the first set of

petitions for a proposition is found not to be in proper form or is found to be invalid, the clerk shall (i) reject the first set of petitions, (ii) accept the first provisionally accepted set of petitions that is in proper form and is not found to be invalid, and (iii) reject all other provisionally accepted sets of petitions setting forth the same (or substantially the same) proposition. Notice of the filing of the petition and the result of the election shall be given to the Secretary of State at his offices in both, Chicago and Springfield, Illinois. A return of the result of the election shall be made to the clerk of the city, village or incorporated town in which the precinct is located. If a majority of the voters voting upon such proposition vote "YES", the sale at retail of alcoholic liquor shall be prohibited in the precinct or at the street address. If the sale at retail of alcoholic liquor at a particular street address is prohibited pursuant to this Section, the license for any establishment at that street address shall be void, and no person may apply for a license for the sale at retail of alcoholic liquor at an establishment at that street address unless such prohibition is discontinued pursuant to Section 9-10.

In cities, villages and incorporated towns of 200,000 or less population, as determined by the last preceding Federal census, the vote upon the question of prohibiting the sale at retail of alcoholic liquor, or alcoholic liquor other than beer containing not more than 4% of alcohol by volume, or alcoholic liquor containing more than 4% of alcohol by weight in the original package and not for consumption on the premises, shall be by the voters of the political subdivision as a unit. When any legal voters of such a city, village or incorporated town desire to pass upon the question of whether the sale at retail of alcoholic liquor shall be prohibited in the municipality, they shall, at least 90 days before an election, file in the office of the clerk of the municipality, a petition directed to the clerk, containing the signatures of not less than 25% of the legal voters registered with the board of election

commissioners or county clerk, as the case may be, from the municipality. The petition shall request that the proposition, "Shall the sale at retail of alcoholic liquor be prohibited in . . . ?" be submitted to the voters of the municipality at the next ensuing election at which the proposition may be voted upon. The submission of the question to the voters of the municipality at such election shall be mandatory when the petition has been filed in proper form with the clerk. If more than one set of petitions are presented to the clerk for submission at the same election, setting forth the same or different propositions, the petition presented first shall be given preference and the clerk shall refuse to accept any other set of petitions. Notice of the filing of the petition and the result of the election shall be given to the Secretary of State at his offices in both Chicago and Springfield, Illinois. A return of the result of the election shall be made to the clerk of the city, village or incorporated town. If a majority of the voters voting upon the proposition vote "Yes", the sale at retail of alcoholic liquor shall be prohibited in the municipality.

In the event a municipality does not vote to prohibit the sale at retail of alcoholic liquor, the council or governing body shall ascertain and determine what portions of the municipality are predominantly residence districts. No license permitting the sale of alcoholic liquors shall be issued by the local liquor commissioner or licensing officer permitting the sale of alcoholic liquors at any place within the residence district so determined, unless the owner or owners of at least two-thirds of the frontage, 200 feet in each direction along the street and streets adjacent to the place of business for which a license is sought, file with the local liquor commissioner or licensing officer, his or their written consent to the use of such place for the sale of alcoholic liquors.

In each township or road district lying outside the corporate limits of a city, village or incorporated town, or in a part of a township or road district lying partly within and

partly outside a city, village or incorporated town, the vote of such township, road district or part thereof, shall be as a unit. When any legal voters of any such township, or part thereof, in counties under township organization, or any legal voters of such road district or part thereof, in counties not under township organization, desire to vote upon the proposition as to whether the sale at retail of alcoholic liquor shall be prohibited in such township or road district or part thereof, they shall, at least 90 days before an election, file in the office of the township or road district clerk, of the township or road district within which the election is to be held, a petition directed to the clerk and containing the signatures of not less than 25% of the legal voters registered with the county clerk from such township or road district or part thereof. The submission of the question to the voters of the township, road district or part thereof, at the next ensuing election shall be mandatory when the petition has been filed in proper form with the clerk. If more than one set of petitions are presented to the clerk for submission at the same election, setting forth the same or different propositions, the petition presented first shall be given preference and the clerk shall refuse to accept any other set of petitions. A return of the result of such election shall be made to the clerk of the township or road district in which the territory is situated, and shall also be made to the Secretary of State at his offices in both Chicago and Springfield, Illinois.

5/9-10. Petition for prohibition—Election—Form of proposition

§ 9-10. Upon the filing in the office of the clerk, at least 90 days before an election in any political subdivision or precinct, as the case may be, of a petition directed to such clerk, containing the signatures of not less than 25% or 40% of the legal voters of the territory which has prohibited the sale at retail of alcoholic liquor or the sale at retail of alcoholic liquor other than beer containing not more than 4%

of alcohol by weight or the sale at retail of alcoholic liquor containing more than 4% of alcohol by weight except in the original package and not for consumption on the premises, or a petition directed to such clerk containing the signatures of not less than 25% of the legal voters of a municipality within which such territory is located, to submit to the voters thereof the proposition to continue such prohibition, the clerk shall certify such proposition to the proper election officials, who shall submit the proposition at such election to the voters of such political subdivision or precinct. Where such proposition is submitted pursuant to a petition signed by not less than 25% of the legal voters of a municipality within which such territory is located, the legal voters of the entire municipality may vote on the proposition. For the purposes of this Section, the number of legal voters shall be computed upon the same basis as is provided in Section 9-2 for the filing of a petition for referendum on the question of whether the sale at retail of alcoholic liquor shall be prohibited. So far as applicable, the provisions of Sections 9-1, 9-4, 9-5, 9-6 and 9-7 shall apply. The proposition shall be in the following form:

Shall the prohibition of the sale at retail of alcoholic liquor (or alcoholic liquor other than beer containing not more than 4% of alcohol by weight) or (alcoholic liquor containing more than 4% of alcohol by weight in the original package and not for consumption on the premises) be continued in (or at). . . . . ?	YES	
	NO	

In a precinct referendum, the referendum ballot shall also contain a common description of the precinct in plain and nonlegal language, which may be prepared by the election official or adopted from the description on the petition, unless

the election official responsible for conducting the election determines that a description cannot be included within the space limitations on the ballots to be used in the election. If the description is not to be included on the ballot, the clerk shall prepare large printed copies of the description of the precinct together with a notice of the proposition which shall be prominently displayed in the precinct polling place at the election. If a majority of the voters voting upon such last mentioned proposition in any such political subdivision or precinct vote "NO", such prohibition shall cease in such political subdivision or precinct or at the applicable licensed establishment; and where such political subdivision or precinct is a city, village or incorporated town situated wholly or partly within the boundaries of a township or road district having a similar prohibition, a majority vote of the voters voting "NO" upon such proposition as above described will result in the prohibition ceasing in that part of the township or road district situated within such city, village or incorporated town. In the event the boundaries of such political subdivision or precinct have been altered or the numbers of any precincts have been changed subsequent to the original election making the territory prohibited territory and prior to the filing of such petition for resubmission of the question, only those voters actually residing in the prohibited territory shall be eligible as signers of such resubmission petition, except that this limitation shall not apply in the case of a resubmission petition signed by at least 25% of the legal voters of a municipality in which the prohibited territory is located. The petition mentioned in this Section shall be a public document and shall be subject to inspection by the public.

5/9-11. Resubmission of question

§ 9-11. A vote under the provisions of this Act in and for any political subdivision or precinct or licensed establishment upon the proposition to prohibit the sale at retail of alcoholic liquor or to prohibit the sale at retail of alcoholic liquor other

than beer containing not more than 4% of alcohol by weight or to prohibit the sale at retail of alcoholic liquor containing more than 4% of alcohol by weight except in the original package and not for consumption on the premises or in and for any political subdivision or precinct upon the proposition to continue any of such prohibitions shall be a bar to the submission to the voters thereof of any of such propositions as applied to all or any part of that political subdivision or precinct for 47 months thereafter.

Supreme Court, U.S.
FILED
OCT 18 2000
CLERK

(2)

No. 00-270

In The

Supreme Court of the United States

RICHARD M. DALEY, *et al.*,

Petitioners,

v.

CLUB MISTY, INC.,
doing business as TEQUILA ROADHOUSE, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the Seventh Circuit properly interpreted Illinois law as requiring "cause" for the revocation of Illinois liquor licenses, and whether the court then properly determined that a targeted referendum by which a small group of residents vote on whether a licensee deserves to have its license voided deprives a licensee of property without due process of law.

RULE 29.6 STATEMENT

Respondent Club Misty, Inc., d/b/a Tequila Roadhouse has no parent company, and no publicly held company owns 10% or more of Club Misty's stock.

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STATUTES INVOLVED

Section 9-2 of the Illinois Liquor Control Act, 235 ILCS 5/9-2 (1998).

STATEMENT

Since before the early 1980s, when Respondents, Alberto Bedoya, d/b/a Casanova's, Inc. ("Bedoya") and Club Misty, Inc., d/b/a Tequila Roadhouse ("Club Misty"), were first granted Illinois liquor licenses, Illinois law has entitled liquor licensees to retain their licenses unless the licensee is found to have engaged in some conduct providing cause for revocation or non-renewal. See *Reed v. Village of Shorewood*, 704 F.2d 943 (7th Cir. 1983). Respondents have operated their respective establishments in Chicago for some two decades, and the record reveals no hint that either has ever given any cause to have its liquor license revoked or not renewed. Yet had the Seventh Circuit not granted them relief, Respondents' licenses would have been voided, and their longstanding businesses destroyed, by targeted referenda held in late 1998 and early 1999. These referenda were conducted pursuant to a 1994 Illinois statutory provision that allows the majority of the participating voters in a Chicago precinct – a few hundred voters – to prohibit the sale of alcohol at the address of a specific establishment (hereinafter, the "Targeted Referendum Provision" or the "Provision"). See 235 ILCS 5/9-2.

These targeted referenda stand in stark contrast to the kind of general local-option-referenda that traditionally have been used in Chicago and many other areas.

See 235 ILCS 5/9-2. A general local-option-referendum asks the voters of a political unit whether they wish to prohibit the sale of liquor throughout the entire political unit; a targeted referendum asks whether a particular establishment's license should be revoked even though liquor sales will continue to go forward within the political unit. In *Philly's v. Byrne*, 732 F.2d 87 (7th Cir. 1984), the Seventh Circuit upheld the constitutionality of general local-option-referenda on the ground that due process was satisfied because "[t]he requirement that the precinct electorate act across the board shows that the judgment that the voters are asked to make is legislative rather than adjudicative in character." *Id.* at 92. The court distinguished the general local-option-referenda it upheld from targeted referenda that focus on individual establishments. See *ibid.* ("the Illinois act does not permit the precinct's voters to single out a particular liquor seller to shut down.").

Five years after the decision in *Philly's* the Illinois legislature enacted a provision allowing voters in Chicago precincts to hold referenda on the fate of individual licensees. The statute was promptly struck down as violating the Due Process Clause. See *87 South Rothschild Liquor Mart v. Kozubowski*, 752 F. Supp. 839 (N.D. Ill. 1990). In 1994, however, the Illinois legislature tried again, amending the statute to allow voters of Chicago precincts to decide whether a licensee at a specified address should lose its right to sell liquor. 235 ILCS 5/9-2. It was pursuant to this 1994 enactment that targeted referenda were held on the future of Respondents' licenses.

Threatened with the destruction of their livelihoods, Respondents filed an action in the United States District Court for the Northern District of Illinois challenging the Targeted Referendum Provision on a number of grounds, including a claim that the targeted referenda deprived them of property without due process of law. In so arguing, Respondents relied on settled Seventh Circuit precedent holding that Illinois liquor licenses constitute "property" for purposes of the Due Process Clause because Illinois law entitles a licensee to retain the license unless the licensee does something that provides "cause" for revocation. See, *e.g.*, *Reed*, 704 F.2d at 949. The District Court rejected Respondents' due process claim, holding that because the newly enacted Targeted Referendum Provision empowers voters to void licenses without cause, Respondents no longer possess property interests in their liquor licenses. Pet. App. 36a-53a.

The Seventh Circuit reversed. Pet. App. 10-20a. Writing for the majority, Judge Posner explained that, even after passage of the Targeted Referendum Provision, Illinois law continues to protect a licensee's right to hold its license so long as the licensee does not provide cause for revocation. Looking at the language, structure, and history of the provision, the court explained as follows:

> Illinois could if it wanted forbid such sale [of liquor] altogether; it certainly is not required to give liquor licensees the attributes of constitutional property. But it has given them those attributes, as we have seen, and the challenged statute does not purport to remove them. It creates no new substantive criteria for the grant

> or withdrawal of Illinois liquor licenses. Nothing in it purports to alter the "for cause" condition that makes those licenses property within the meaning of the due process clause. * * * All the referendum statute does is provide an alternative procedure for revocation of liquor licenses. This is apparent from the legislative history, as we are about to see. The supporters of the statute believed that it would provide a swifter alternative to administrative procedures for revoking the licenses of "bad apples," which is to say licensees who had given cause for revocation.

Pet. App. 7a-8a. The court then held that targeted referenda do not provide a constitutionally adequate procedure for determining whether a licensee had done anything to provide just cause for revoking its license. Pet. App. 8a-13a.

Although Judge Bauer dissented from the majority's ultimate holding, he did not dissent from the court's conclusion that an Illinois liquor license continues to constitute property given the nature of Illinois law. See Pet. App. 14a-20a.[1]

---

[1] As Petitioners acknowledge, Judge Bauer's dissent takes issue only with the panel majority's conclusion on the second step of the due process analysis – whether the Targeted Referendum Provision provides adequate process. Pet. 16 n.6. Petitioners have not argued that this latter question independently justifies granting a writ of *certiorari*.

REASONS FOR DENYING THE PETITION

This case fits none of this Court's criteria for the granting of *certiorari*. See United States Supreme Court Rule 10. To begin with, the decision by the Seventh Circuit does not, in any sense, "conflict with the decision of another United States court of appeals on the same important matter." Rule 10(a). Petitioners have invented conflicts with the Eighth and Tenth Circuits by citing cases so irrelevant to this case that Petitioners never cited them below. As will be seen, neither of these decisions conflicts with the decision of the Seventh Circuit in any way.

Nor do Petitioners even suggest that the Seventh Circuit "has decided an important federal question in a way that conflicts with a decision by a state court of last resort." *Ibid*. The best that Petitioners can do in this regard is to argue that the Seventh Circuit's longstanding position that Illinois liquor licenses are property conflicts with some decisions of the Illinois Appellate Court. Such conflicts with an intermediate appellate court plainly fail to qualify under this Court's Rule 10. Moreover, the conflicts in this instance reflect nothing more than the fact that the Illinois Appellate courts have not reevaluated the vitality of several antiquated precedents that were decided long before this Court established the modern approach for defining constitutional "property." In any event, as we will explain, given the nature of the Petitioner's argument, this case presents no vehicle for this Court to resolve the issue upon which the Seventh Circuit and the Illinois Appellate Court disagree.

Finally, Petitioners can make no persuasive claim that the issue decided by the Seventh Circuit is one that necessarily should be "settled by this Court," or that the Seventh Circuit has decided "an important federal question in a way that conflicts with relevant decisions of this Court." Rule 10(c). Instead, the Seventh Circuit's decision reflects nothing more than a court applying well-settled constitutional principles to a specific fact pattern – and reaching a decision consistent with the decision of every other federal court to have confronted the question.

I. THERE IS NO CONFLICT BETWEEN THE DECISION OF THE SEVENTH CIRCUIT IN THIS CASE AND ANY OTHER UNITED STATES COURT OF APPEALS.

Three federal courts have considered the constitutionality of targeted referenda such as the one at issue here, and each has held that such referenda violate the due process rights of liquor licensees. See Pet. App. 1a-20a (decision of the Seventh Circuit in this case invalidating the Illinois Targeted Referendum Provision); *Brookpark Entertainment, Inc. v. Taft*, 951 F.2d 710 (6th Cir. 1991) (striking down Ohio's targeted referendum statute), cert. denied, 506 U.S. 820 (1992); *87 South Rothschild Liquor Mart v. Kozubowski*, 752 F. Supp. 839 (N.D. Ill. 1990) (striking down the predecessor of the provision challenged here). Each of these courts held that the Due Process Clause protects licensee's interest and that the Clause was violated by allowing a small group of local voters to decide the fate of a licensee's livelihood. There

is no conflict between any federal decisions on this issue. Nor is there any conflict among federal courts on the more general question of whether a liquor licensing system such as that used in Illinois creates constitutionally protected property interests.

Instead, Petitioners argue that a conflict among the circuits exists on the abstract question of "how to evaluate the role of discretion in the licensing process." Pet. at 7. The two cases upon which Petitioners rely to demonstrate such a conflict reveal that no such conflict exists.

In the first of the cases upon which Petitioners rely, the United States Court of Appeals for the Tenth Circuit held that an individual's interest in the *renewal* of livestock grazing allotments at the same level as the previous allotment did not constitute a protected "property" interest. *Federal Lands Legal Consortium v. United States* [hereinafter, *FLLC*], 195 F.3d 1190 (10th Cir. 1999). The court based this conclusion on the relevant statutes and regulations that granted the Secretary of Interior unfettered discretion to decide whether to renew grazing permits and whether to set new limits on grazing allotments as part of the renewal process. See *id.* at 1198. Thus, the court concluded that permit holders have no "legitimate claim of entitlement to the terms and conditions of their previous permits." *Id.* at 1100. At the same time, though, the court cautioned that it was not deciding whether holders of allotments have property interests during the terms of their permits. *Id.* at 1198 n.7.

There is absolutely no tension, much less a conflict, between the Tenth Circuit's approach in *FLLC* and the Seventh Circuit's approach in this case. The Tenth Circuit

merely held that because renewal of grazing allotments was a matter of administrative grace, no property interest accrued. The Seventh Circuit agreed explicitly with this principle, explaining that were it the case that Illinois liquor licensees held their licenses as "a matter of administrative grace," they would have no property interest in renewal of their licenses. App. to Pet. 4a. The Seventh Circuit's holding that Illinois liquor licensees enjoy property interests was based on its conclusion that under Illinois law "[t]he license is revocable only for cause." *Ibid.* Although Petitioners obviously disagree with the Seventh Circuit's analysis of Illinois law on this point (a matter we address at *infra* 15-17), that disagreement about the proper interpretation of Illinois law hardly creates a conflict between the approaches of the Tenth and Seventh Circuits – courts that agree fully on the relevant governing principles.

Petitioner's effort to suggest a conflict between the decision below and the Eighth Circuit's decision in *Movers Warehouse, Inc. v. City of Little Canada*, 71 F.3d 716 (8th Cir. 1995), is equally flawed. The court in *Movers Warehouse* looked at the relevant statutes and regulations that governed renewal of bingo licenses in a specific Minnesota city, and concluded that, although the relevant laws may "create a property interest in an existing license," there were no standards at all with reference to renewals of licenses. *Id.* at 719. The court's resulting holding – that the licensee's unilateral expectation of renewal did not qualify as a protected property interest – was an unexceptional application of settled precedents. Indeed, the Seventh Circuit cited *Movers Warehouse* approvingly for the proposition that there is no property

interest in license renewals where renewal is a manner of "administrative grace." Pet. App. 4a. The fact that Minnesota law treats bingo licenses differently from the way Illinois law treats liquor licenses hardly indicates any conflict between the circuits.

Despite the fact that all three courts agreed on the relevant legal principles, Petitioners try to create the impression of a conflict by mischaracterizing the nature of the state and local laws at issue in *FLLC* and *Movers Warehouse*. According to Petitioners, both *FLLC* and *Movers Warehouse* involved cases in which the relevant laws conferred "specified entitlements on the licensee." Pet. 9. As the courts made clear in those cases, however, there were no such entitlements to renewal in either situation. Rather, renewal was completely discretionary. See *FLLC*, 195 F.3d at 1200 ("the statutory scheme gives the Forest Service discretion to change the terms and conditions during the permit renewal process"); *Movers Warehouse*, 71 F.3d at 720 ("state law places no substantive limitations on the discretion of the licensing authority").

Here, by contrast, the Seventh Circuit concluded that Illinois law entitles a licensee to retain its license absent cause for revocation. Based on the language of the statute, the structure of the law and the intent of the legislature, the Seventh Circuit concluded that the referendum system was not intended to make liquor licenses terminable at will, but was intended to create a new mechanism for deciding whether there is "cause" to revoke a license. See Pet. App. at 7a (holding that Illinois has given its liquor licensees "the attributes of constitutional property * * * and the challenged [referendum] statute does not purport to remove them. * * * Nothing in it purports to

alter the 'for cause' condition that makes those licenses property within the meaning of the due process clause"). As we mentioned above, Petitioners disagreement with the Seventh Circuit's conclusions about Illinois law does not transform this case into one in which courts conflict over governing legal principles. There is complete concordance among the Seventh, Eighth and Tenth Circuits on the relevant legal standards for assessing whether a license creates a property interest, and there is no conflict for this Court to resolve.

II. THE SEVENTH CIRCUIT HAS NOT DECIDED ANY IMPORTANT FEDERAL QUESTION IN A MANNER THAT CONFLICTS WITH A DECISION BY A STATE COURT OF LAST RESORT.

Petitioners' primary contention in support of its request that the Court grant *certiorari* is that a conflict exists between the Seventh Circuit's decision and a series of Illinois Appellate Court cases. Unlike their attempt to invent a conflict among the United States courts of appeals, Petitioners are correct to point out that there is disagreement between the Seventh Circuit and the Illinois Appellate Court on the general issue of whether Illinois liquor licenses qualify as property for due process purposes. This conflict has existed since 1983, when the Seventh Circuit first analyzed the status of Illinois liquor licenses under the constitutional standards established by this Court in *Board of Regents v. Roth*, 408 U.S. 564 (1972), and *Perry v. Sindermann*, 408 U.S. 593 (1972). See *Reed*, 704 F.2d at 943.

In *Reed*, the Seventh Circuit held that because Illinois liquor licenses could be revoked or not-renewed only for cause, these licenses qualifies as property for due process purposes. *Id.* at 949. The court in *Reed* stressed that the relevant inquiry is a functional one that looks at whether "under Illinois law a liquor license is securely and durably the licensee's." *Id.* at 948. The court explained that even though the Illinois Liquor Control Act had long declared that liquor licenses are not "property," but are instead "privileges," the use of the word

> '[p]roperty' in the Illinois Liquor Control Act need not mean the same thing as 'property' in the due process clause. *Perry v. Sindermann*, 408 U.S. 593 (1972), the companion case to *Roth*, held that a teacher's tenure contract creates a species of property, though it would not be so described under state law. And the rights of welfare recipients, though also not property in the conventional sense, were held in *Goldberg v. Kelly*, 397 U.S. 254, 261-62, (1970), to be property for purposes of the due process clause. Liquor licenses in Illinois cannot be sold or bequeathed and are limited in other ways that deprive them of some of the conventional attributes of property, but this does not mean they are not property in a due process clause sense.

Reed, 704 F.2d at 947.

The Illinois appellate courts have not followed *Reed*. See, *e.g.*, *Blue Cat Lounge, Inc. v. License Appeal Commission*, 281 Ill. App. 3d 643, 647, 667 N.E.2d 554, 557 (Ill App. Ct. 1996); *Ross v. Kozubowski*, 182 Ill. App. 3d 687, 691, 538 N.E.2d 623, 626 (Ill. App. Ct. 1989). Instead, they have continued to follow an obviously obsolete 1908 decision

of the Illinois Supreme Court holding that liquor licenses do not constitute property as that term was defined long ago. See *People v. McBride*, 234 Ill. 146, 179, 84 N.E.2d 865, 872-73 (1908).

The Illinois appellate cases have never engaged in any re-analysis of this issue in the aftermath of *Kelly*, *Roth*, *Perry* or the many other due process decisions of this Court over the past three decades. Indeed, only one of the Illinois decisions ever acknowledged the existence of these decisions, or the Seventh Circuit's decision in *Reed*. See *Black Knight Restaurant, Inc. v. City of Oak Forest*, 159 Ill. App. 3d 1016, 513 N.E.2d 109 (Ill. App. Ct. 1987). The court's holding in *Black Knight* that the state statute's declaration that licenses are not "property" is determinative of the constitutional inquiry (*id.* at 1019, 513 N.E.2d at 111), is flatly inconsistent with this Court's pronouncement that "although the underlying substantive interest is created 'by an independent source such as state law,' federal constitutional law determines whether that interest rises to the level of a 'legitimate claim of entitlement' protected by the Due Process Clause." *Memphis Light, Gas & Water Division v. Craft*, 436 U.S. 1, 9 (1978) (quoting *Roth*, 408 U.S. at 577; *Perry*, 408 U.S. at 602). The Illinois Supreme Court has not yet confronted the status of Illinois liquor licenses under modern due process jurisprudence.

There is a reason that this Court's Rule 10 does not include conflicts with an intermediate state court as a justification for issuing a writ of *certiorari*. At the moment, we have no idea how the Illinois Supreme Court will deal with the constitutional status of Illinois liquor licenses when it has occasion to confront the question. If the Illinois Supreme Court ultimately disagrees with the

Seventh Circuit, there will be a proper opportunity for this Court to consider whether *certiorari* is appropriate. At the moment, though, there is no conflict that justifies *certiorari*.[2]

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[2] Petitioners also refer to two other conflicts between various state and federal courts regarding the status of liquor licenses in other jurisdictions. Pet. at 6-7. Once again, these purported conflicts provide no support for Petitioners' request that this Court grant *certiorari* here. Petitioners first assert that the decision in *Brookpark Entertainment, Inc. v. Taft*, 951 F.2d 710 (6th Cir. 1991), cert. denied, 506 U.S. 820 (1992), is at odds with decisions of Ohio courts which have "long held that a license is not property." Pet. 6. Petitioners cite to a 1935 decision of the Ohio Supreme Court to support this supposed conflict, but, as the court in *Brookpark* noted, more recent Ohio decisions have acknowledged that Ohio liquor licenses might qualify as constitutional property. See *Brookpark*, 951 F.2d at 716 (citing *Scioto Trails Co. v. Ohio Dep't of Liquor Control*, 11 Ohio App. 3d 75, 80, 462 N.E.2d 1386, 1391 (Ohio Ct. App. 1983), and *Rickard v. Ohio Dep't of Liquor Control*, 19 Ohio App. 3d 133, 138, 504 N.E.2d 724, 729 (Ohio Ct. App. 1986)). Indeed, decisions from the Ohio Appellate Court after *Brookpark* reveal that any remaining disagreement is working itself out without this Court's assistance. See *Hi Rise, Inc. v. Ohio Liquor Control Commission*, 106 Ohio App. 3d 151, 156, 665 N.E.2d 707, 711 (Ohio Ct. App. 1995) (recognizing that although federal decisions such as *Brookpark* "are not binding upon us, they do make points we consider worthy of reconsideration"); *State v. Hall*, No. 93AP-346, 1993 WL 310399, at *1 (Ohio App. 10 Dist. Aug. 10, 1993) (relying on *Brookpark* to grant partial relief to party who lost his liquor license through a targeted referendum).

Petitioners next claim a rift between the New Jersey Supreme Court of the 1950's and a fourteen-year-old decision from the District of New Jersey, *Sea Girt Restaurant & Tavern Association, Inc. v. Borough of Sea Girt*, 625 F. Supp. 1482 (D.N.J.), aff'd mem., 802 F.2d 448 (3d Cir. 1986). Pet. 6. Petitioners omit,

There is, moreover, another major flaw in the Petitioners' assertion that this Court should review the Seventh Circuit's decision in order to resolve the conflict between the Seventh Circuit and the Illinois Appellate Court. This case does not present an appropriate vehicle to resolve the conflict between the courts on this question because Petitioners do not urge reversal based on the reasoning or holding of the Illinois appellate courts. Petitioners do not argue that Illinois liquor licenses generally are not property – as the Illinois courts have held. As the Seventh Circuit observed, Petitioners did "not challenge any of" the Seventh Circuit's cases holding that liquor licenses generally constitute property. Pet. App. 5a. Rather, Petitioners argued below and argue here that, notwithstanding *Reed* and the other cases holding that Illinois liquor licenses qualify as property, the Targeted Referendum Provision affects the scope of a licensee's property interest. See Pet. App. 6a ("The City denies that a liquor license is property for a reason unrelated to *Reed* – that the challenged statute so eviscerates the rights of liquor licensees as to destroy their status as owners of constitutional property.").

The Seventh Circuit's rejection of Petitioners' argument on the impact of the Targeted Referendum Provision

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however, that the court in *Sea Girt* reached its conclusion that New Jersey liquor licenses were constitutional property by relying on "the sound reasoning of the New Jersey Supreme Court" in *The Boss Co., Inc. v. Board of Commissioners*, 40 N.J. 379, 385, 192 A.2d 584, 588 (1963) (agreeing that "a liquor license can be classified as 'property' for federal purposes despite a [state] legislative pronouncement to the contrary."). See *Sea Girt*, 625 F. Supp. at 1487-88.

does not conflict with any decision of an Illinois court – no Illinois court has ever confronted that question. It is clear, then, that this case does not present a suitable vehicle for settling the conflict Petitioners have identified – whether Illinois law generally creates a property interest in liquor licenses. Even were this Court to grant *certiorari* and decide the case in accordance with Petitioners' arguments (*i.e.*, hold that the Targeted Referendum Provision means that licensees in Chicago possess no property interest if the voters oust them), the conflict between the Seventh Circuit and the Illinois appellate courts on the general question of whether liquor licenses are constitutional property would continue to exist.

III. THE SEVENTH CIRCUIT'S DECISION IS FULLY CONSONANT WITH THE DECISIONS OF THIS COURT AND DOES NOT OTHERWISE INVOLVE AN ISSUE OF SUCH MAGNITUDE THAT IT MUST BE SETTLED BY THIS COURT.

Despite Petitioners' efforts to depict this case as involving some significant issue of constitutional methodology, Petitioners' only dispute with the Seventh Circuit turns on the way that the Seventh Circuit analyzed Illinois law in the aftermath of the Targeted Referendum Provision. Petitioners contend that the Targeted Referendum Provision dramatically altered Illinois law, making all liquor licenses revocable at the whim of the electorate, regardless of whether the licensee has done anything wrong, or caused any harm. The Seventh Circuit did not read Illinois law in this manner, though. Instead, its analysis of the entire Illinois Liquor Control Act, including

the Targeted Referendum Provision, led it to conclude that "[n]othing in [the Provision] purports to alter the 'for cause' condition that makes licenses property within the meaning of the due process clause." Pet. App. 7a.

In support of this conclusion, the Seventh Circuit looked to the language and structure of the Act. *Ibid.* The court also cited to the legislative history of the provision, which made it clear that the legislature was not empowering residents of a precinct to destroy a business-owner's livelihood at whim. Rather, the provision was designed to close down licensees who are "causing real problems * * * This will not penalize the good licenses in these areas, but will only target that bad operator." Pet. App. 9a (quoting Statement of Rep. McGann in the Transcript of General Assembly, June 27, 1989, at 138-39). See also Pet. App. 9a (provision will allow the closing of "a particular tavern that's causing a tremendous problem. I have a lot of them in my district, where you have drug dealers, where you have prostitution, where you have knifings and shootings.") (quoting Statement of Sen. Marovitz in Transcript of General Assembly, July 1, 1989, at 3).

The Seventh Circuit refused to accept the idea that a provision that was sold to the legislature as affecting only bad licensees, in fact was designed to allow for the revocation of a licensee who is behaving perfectly and whose establishment is causing no problems. Hence, the Seventh Circuit concluded that all the Targeted Referendum Provision "does is provide an *alternative procedure*" for terminating offending licensees. Pet. App. 7a

(emphasis added).[3] It was that "alternative procedure" that the court found to violate the Due Process Clause, based on this Court's unequivocal holding in *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985). See Pet. App. 7a.

The Seventh Circuit did not ignore any of this Court's teachings; it applied those teaching to the Illinois statute, according to its interpretation of the Targeted Referendum Provision – an interpretation with which no court at any level has disagreed. The Seventh Circuit's conclusion that Illinois liquor licenses remain a species of property therefore involves nothing more than the case-specific application of settled legal principles about which even the parties in this case do not disagree.[4]

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[3] Although Petitioners challenge this analysis of Illinois law, Petitioners themselves acknowledge at various points that the Targeted Referendum Provision was not designed to give "unfettered discretion" to a few hundred neighbors. See, *e.g.*, Pet. 14 ("The referendum process gives the affected community the ability to address these *problem establishments*") (emphasis added); Pet. 16 n.5 (provision affects a "licensee that is disturbing its community").

[4] In light of the Seventh Circuit's interpretation of Illinois law, the court had no occasion to consider Respondents' claim that the Targeted Referendum Provision could not possibly affect a licensee's property interest. The fact that the Provision empowers voters in a precinct to *effect a change in the law* and to restrict liquor sales does not mean that a licensee lacks a property interest, any more than the general power of any legislature to prospectively change the law defeats the creation of a property interest. Every license (and every other form of entitlement) is held under that potential cloud. For example, ever since *Goldberg v. Kelly*, 397 U.S. 254 (1970), it has been recognized that welfare recipients can have property interests in

Ultimately, then, Petitioners are relegated to arguing that this Court should grant *certiorari* because the decision of the Seventh Circuit "poses serious problems for municipalities struggling to address the problems associated with the sale of alcoholic beverages." Pet. 13. Petitioners repeatedly describe the Provision as a "crucial mechanism" (*id.* 4), an "important option" (*id.* 5), and "an important community-driven mechanism" (*id.* 13). It is difficult to take these characterizations very seriously though, given the fact that only two jurisdictions in the entire Country have ever tried to use targeted referenda, and both efforts were struck down as violations of due process. Moreover, even in Illinois, the Targeted Referendum Provision applies only in the City of Chicago. See 235 ILCS 5/9-2 (Provision applies only to city, village or town of more than 200,000 inhabitants). There is, to be sure, a venerable history of liquor-related referenda over the last 100 years (Pet. 14-15), but these referenda have all involved permissible general-local-option-referenda, which qualify as valid *general* decisions on whether any liquor sales should be allowed in the entire political unit. They have not involved *targeted* referenda about whether a particular individual deserves to lose his or her license to sell liquor.[5]

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their future benefits. This is true even though any welfare recipient always lives with the threat that the laws will change and the benefit program will be removed or modified. Of course, any change in the law must comport with due process – which targeted referenda do not.

[5] The distinction between general and targeted statutes traces back to the Supreme Court's decisions in *Bi-Metallic Investment Co. v. State Bd. Of Equalization*, 239 U.S. 441 (1915),

The "crucial mechanism" for controlling individual licensees in this Country has been through license revocation proceedings before duly constituted liquor control commissions. Petitioners claim that some "defects in the revocation process from the community's perspective" justify abandoning the protections that this adjudicative process provides. Pet. 15. For example, Petitioners express frustration over the difficulty of convincing local prosecutors to commence revocation proceedings. *Ibid.* Petitioners complain also that the majority of the members of the state agency that reviews revocations in Illinois are appointed by the Governor, meaning that these members are "not only unaccountable to the residents living in the affected neighborhoods, but far more likely to be influenced by the liquor lobby than the welfare of individual neighborhoods." *Ibid.* To the extent that these parochial complaints about the Illinois regulatory system reflect real problems, Petitioners are entitled to work within the state legislature to improve the regulatory system. It is unreasonable, however, for Petitioners to suggest that factors such as the political allegiances of members of the Illinois Appeal Commission transform

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and *Londoner v. Denver*, 210 U.S. 373 (1908). These cases, which Petitioners never mention, establish the bedrock rule that a person affected by a "general statute" is not entitled to indvidualized due process, but when specific individuals are the targets, then a right to a hearing is indispensable. See generally *United States v. Florida East Coast Ry. Co.*, 410 U.S. 224, 245 (1973) ("[l]ater decisions have continued to observe the distinction" between *Bi-Metallic* and *Londoner*).

this case into one of national significance that merits this Court's review.[6]

As the Seventh Circuit explained, "the guarantee of due process would mean little if it could be dispensed with upon a showing, which could be made in every case, that a remedy that provides no procedural safeguards at all will be faster and cheaper than one that provides some." Pet. App. 9a. For all the concern that Petitioners express about the community's interest in closing down offending establishments without providing any hearings, Petitioners afford no weight to the rights and interests of a licensee who is the subject of a targeted referendum.

Determining how much process is due in a particular context requires a balancing of competing considerations, including the "private interests that will be affected by

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[6] Petitioner's cursory claim that this case implicates important Twenty-First Amendment concerns is unfounded. Petitioners cannot, and do not, take issue with the rule that

> "although the Twenty-First Amendment limits the effect of the dormant Commerce Clause on a State's regulatory power over the delivery or use of intoxicating beverages within its borders, 'the Amendment does not license the States to ignore their obligations under other provisions of the Constitution.' " *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 516 (1996) (quoting *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 712 (1984)). See also *Craig v. Boren*, 429 U.S. 190, 206 (1976) ("Neither the text nor the history of the Twenty-first Amendment suggests that it qualifies individual rights protected by the Bill of Rights and the Fourteenth Amendment where the sale of liquor is concerned.").

the official action." *Matthews v. Eldridge*, 424 U.S. 319, 335 (1976). Here, the deprivation is extreme. Licensees often invest their life savings and energies into building up an establishment. It is not unusual for the licensee's family (as well as families of the establishment's employees) to be financially dependent on the establishment. All that the Seventh Circuit held in this case is that licensees in Illinois are entitled to traditional due-process protections against baseless termination of their right to do business. Every court to consider the issue has agreed.

CONCLUSION

The petition for a writ of *certiorari* should be denied.

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No. 00-270

IN THE

Supreme Court of the United States

RICHARD M. DALEY, *et al.*,
Petitioners,

v.

CLUB MISTY, INC.,
doing business as Tequila Roadhouse, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF *AMICUS CURIAE* OF DAVID C. REITZ, DIRECTOR, COLORADO LIQUOR ENFORCEMENT DIVISION IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Whether a liquor license, under substantive state law, is a property interest entitled to protection under the Due Process Clause of the Fourteenth Amendment?

2. Whether a local option referendum entitling voters to prohibit liquor sales at a specific location violates the Due Process Clause of the Fourteenth Amendment in conflict with this Court's decision in *City of Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668 (1976)?

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INTEREST OF THE *AMICUS CURIAE* [1]

David C. Reitz, Director, Colorado Liquor Enforcement Division, as *Amicus Curiae* in support of Petitioners, respectfully urges the Court to grant the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in *Club Misty, Inc. v. Laski*, 208 F.3d 615 (7th Cir. 2000). Colorado joins with more than forty states to use the local option approach to control liquor sales within the local communities. *See* Shelley Ross Saxer, "Down With Demon Drink!": *Strategies for Resolving Liquor Outlet Overconcentration in Urban Areas*, 35 Santa Clara L. Rev. 123, 153-56 (1994). Although all jurisdictions in Colorado are currently "wet," the local option election, which allows a jurisdiction to vote itself dry, is a vital aspect of Colorado's right under the Twenty-First Amendment[2] to allow Colorado residents to control the effects of liquor sales in their neighborhoods. *See* Colo. Rev. Stat. § 12-47-105 (West 2000). Currently, Colorado's statute, unlike the Illinois statute struck down by the Seventh Circuit in this case, does not allow voters to directly vote a specific address dry. However, it does provide that voters may limit liquor sales by "class" of license. *See* Colo. Rev. Stat. § 12-47-105 (West 2000). Thus, Colorado voters could conceivably target a specific tavern, if such tavern were the only tavern in that class of license in the area.

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[1] Pursuant to this Court's Rule 37.2(a), letters of consent from all parties to the filing of this brief have been filed with the Clerk. Pursuant to this Court's Rule 37.6, *amicus* represents that Counsel, Shelley Ross Saxer, has authored the brief in whole with editing assistance from student research assistant, Thomas Inkel, and monetary contribution from Pepperdine School of Law, which, for educational purposes, supplied limited funds for student research assistance and the costs of printing this petition.

[2] Section 2 of the Twenty-First Amendment provides: "The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." U.S. Const. amend. XXI, § 2.

Liquor licenses are subject to the "broad power" granted to states by the Twenty-First Amendment to regulate liquor sales within their borders, and the constitutionality of the single-address referendum procedure must be evaluated in light of this "broad power." *See Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 712 (1984); *see also United Beverage Co. v. Indiana Alcoholic Beverage Comm'n*, 760 F.2d 155, 159 (7th Cir. 1985) ("states have, by virtue of the Twenty-First Amendment, broader authority over the liquor business than over any other business"); *Battipaglia v. N.Y. State Liquor Authority*, 745 F.2d 166, 169 (2d Cir. 1984) (Twenty-First Amendment "should give the states full authority to deal with the subject of intoxicating liquor"). Yet, the courts in Colorado, as in other states, have struggled with the issue of whether a liquor license is a property interest, deserving of constitutional protection. *See, e.g., Mr. Lucky's, Inc. v. Dolan*, 591 P.2d 1021, 1022-23 (Colo. 1979) ("present liquor license, like any business license, is a property right which is entitled to due process protection. . . . [but] there is no unlimited right to a liquor license, and once granted a liquor license is always subject to valid regulations under which it was issued"); *New Safari Lounge, Inc. v. City of Colorado Springs*, 567 P.2d 372, 375 (Colo. 1977) ("[a] liquor license is a type of property right, but it is still a relatively restricted one, and it is subject to those regulations under which it was issued"); *City of Manitou Springs v. Walk*, 367 P.2d 744, 746 (Colo. 1961) (no vested right to renewal of beer license); *Gem Beverage Co. v. Geer*, 334 P.2d 744, 746 (Colo. 1959) ("[u]nder applicable statutes and opinions of this court it is settled that there is no inherent right to carry on the business of selling alcoholic beverages"); *A.D. Jones & Co. v. Parsons*, 319 P.2d 480, 483 (Colo. 1957) (liquor license is property within the meaning of the Due Process Clause although it is not technically property); *see also* Shelley Ross Saxer, *License to Sell: Constitutional Protection Against State or Local Government Regulation of Liquor Licensing*, 22 Hastings Const. L.Q. 441

(1995) (observing that Colorado classifies the liquor license as a constitutionally protected property interest).

Inasmuch as "states have, by virtue of the Twenty-First Amendment, broader authority over the liquor business than over any other business,"[3] it is disconcerting that Colorado courts have generally given liquor licensees greater protection than has been allowed other business licensees, such as bail bondsmen, psychologists, nurses, and state probationary employees. *See Ficarra v. Department of Reg. Agencies, Div. of Ins.*, 849 P.2d 6, 20 (Colo. 1993) (no property interest in renewal of a bail bondsman license entitling the licensee to the protections of procedural due process); *Colorado Soc'y of Community & Institutional Psychologists, Inc. v. Lamm*, 741 P.2d 707, 713 (Colo. 1987) (psychologists had no constitutionally protected claim of entitlement to continue practicing their profession under licensing exemptions later repealed); *Kibler v. State*, 718 P.2d 531, 537-38 (Colo. 1986) (nurse had no constitutionally protected interest in license); *Department of Health v. Donahue*, 690 P.2d 243, 249 (Colo. 1984) (state probationary employee did not have a protected interest in continued employment sufficient to create a constitutionally protected right to a hearing before discharge). Similarly, the Tenth Circuit in *Federal Lands Legal Consortium v. United States*, 195 F.3d 1190, 1196 (10th Cir. 1999) held that federal grazing permits were not constitutionally protected property interests because the permits were statutorily declared not to be property interests and were "revocable at the government's pleasure." This discrepancy in how liquor licensees are treated as compared to other business licensees illustrates the difficulty that both state and federal courts are having with the issue of whether the liquor license, under state substantive law, is a property interest. Therefore, Colorado and other states would be greatly benefited by this Court's guidance as to how a state's

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[3] *United Beverage Co. v. Indiana Alcoholic Beverage Comm'n*, 760 F.2d 155, 159 (7th Cir. 1985).

regulatory structure for liquor licensing under its Twenty-First Amendment authority affects the determination of whether or not a constitutionally protected property interest exists.

Given the documented and disturbing relationship between liquor and crime, Colorado, along with other states, is keenly interested in exploring new approaches to deal with this grave problem. "It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). Reversal of the Seventh Circuit's decision should be expected to spur considerable innovation by the states, which are now stifled by both the decision below and the similar decision of the Sixth Circuit in *Brookpark Entertainment, Inc. v. Taft*, 951 F.2d 710 (6th Cir. 1991). The Colorado Liquor Enforcement Division is vitally interested in receiving guidance from this Court as to whether a liquor license, restricted by local voting control, is a constitutionally protected property interest and whether communities will retain their ability to control the distribution of alcoholic beverages in their neighborhoods through use of the referendum process.

SUMMARY OF ARGUMENT

The Seventh Circuit concluded that a state statute, allowing voters to prohibit the retail sale of alcoholic beverages at a specific address, is unconstitutional as a due process violation. The Seventh Circuit designated an Illinois liquor license to be a property interest deserving of protection under the Due Process Clause of the Fourteenth Amendment, despite the conclusion by some other federal circuits and Illinois state courts that it is not. In holding that a referendum affecting this property interest violated due process, the Seventh Circuit deprived voters of the right to use the referendum process to exert local control over the quality of life in their neighborhoods when liquor license holders generate adverse effects.

There is a conflict among the circuits, as well as between federal and state courts, as to whether a liquor license, under substantive state law, is property within the meaning of the Due Process Clause, reflecting a need for guidance from this Court. Therefore, the petition for certiorari should be granted by this Court to end the conflict among the federal courts over this issue and to make clear, based on the Court's past decisions, that state law must be used to determine whether the nature of the liquor license makes it a property interest deserving of protection under the Due Process Clause of the Fourteenth Amendment. There is also a need to resolve the conflict between this Court's prior decision in *City of Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668 (1976) and the Seventh Circuit's finding that a local option directed at a single parcel is an unconstitutional use of the referendum power.

This Court should act to resolve the conflict among circuits and between state and federal courts as to whether a liquor license, under substantive state law, is a property interest subject to Due Process protection under the Fourteenth Amendment. Furthermore, this Court should clarify the extent to which communities will be allowed to use the referendum process to directly address offending land uses in their neighborhoods.

REASONS FOR GRANTING THE PETITION

I. THIS COURT SHOULD ACT TO RESOLVE THE CONFLICT AMONG CIRCUITS AND BETWEEN STATE AND FEDERAL COURTS AS TO WHETHER A LIQUOR LICENSE, UNDER SUBSTANTIVE STATE LAW, IS A PROPERTY INTEREST SUBJECT TO DUE PROCESS PROTECTION UNDER THE FOURTEENTH AMENDMENT.

The Seventh Circuit, when it decided "to bite the bullet" and pronounce that an Illinois liquor licensee has a property interest, cited case law "that has accreted" since its decisions in *Reed v.*

Village of Shorewood, 704 F.2d 943, 948-49 (7th Cir. 1983) (holding that Illinois liquor license is property for the purposes of the Fourteenth Amendment due process clause) and *Philly's v. Byrne*, 732 F.2d 87, 90-91 (7th Cir. 1984) (holding that there was no denial of due process so the issue of whether there was a deprivation of property was left open). *See Club Misty*, 208 F.3d at 619. Unfortunately, the Seventh Circuit's citation of case law included only those circuits which have found a protected property interest in a state licensing scheme: the Second, Fifth, Sixth, and Seventh Circuits. The court's citation did not include conflicting decisions from the Eighth, Tenth, and Eleventh Circuits, as discussed below.

By citing decisions from other circuits in support of its decision to find a property interest under Illinois law, the Seventh Circuit missed the opportunity to distinguish conflicting circuit decisions. The court did not restrict its decision to Illinois' underlying state law scheme, but instead referenced property interest determinations from other jurisdictions to resolve the extent of constitutional protection under *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972). Accepting from *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 9 (1978) that "[a]lthough the underlying substantive interest is created by 'an independent source such as state law,' federal constitutional law determines whether that interest rises to the level of a 'legitimate claim of entitlement' protected by the Due Process Clause," this Court should resolve the split among the circuits over the criteria used to determine whether a state law license, specifically a liquor license, is subject to constitutional protection under the Due Process Clause.

Federal courts have struggled with the question of whether there exists a property interest in a liquor license and, as in this case, have sometimes contradicted state court holdings.[4] For

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[4] *See, e.g., In re McDaniel*, 1988 Bankr. LEXIS 1428 (N.D. Ind. 1988) ("Although a legal dispute has raged for years as to whether a liquor license is property or constitutes a right to property, state courts have held that liquor

example, in a very similar case in the Sixth Circuit, the court in *Brookpark Entertainment, Inc. v. Taft*, 951 F.2d 710 (6th Cir. 1991) held that a liquor license in Ohio was property protected under the Due Process Clause, despite an Ohio state law refusing to define a liquor license as property. *See id.* at 715-16; *see also 37712, Inc. v. Ohio Dep't of Liquor Control*, 113 F.3d 614, 619-20 (6th Cir. 1997) (affirming that Ohio liquor license is property, but holding that local option process was legislative in nature and did not violate due process because process could not preclude sales at any specific establishment as was done in *Brookpark*); *In re Terwilliger's Catering Plus, Inc.*, 911 F.2d 1168, 1171-72 (6th Cir. 1990) (noting that an Ohio liquor license "constitutes property within the meaning of the Bankruptcy Code"). The Sixth Circuit in *Brookpark*, similar to the Seventh Circuit's decision here, held that the referendum process permitting voters to revoke a specific license based on a liquor law violation was facially invalid as a due process violation. *See Brookpark*, 951 F.2d at 717.

The Third Circuit recognizes a property interest in a Pennsylvania liquor license subject to a lien for unpaid federal employment taxes, although the license does not constitute property subject to security creditors under state law. *See 21 West Lancaster Corp. v. Main Line Restaurant, Inc.*, 790 F.2d 354, 357-358 (3d Cir. 1984). A liquor license is also considered property for purposes of a bankruptcy estate within the definition of Section 541 of the Bankruptcy Act. *See In re Nejberger*, 934 F.2d 1300, 1302 (3d Cir. 1991). In addition to these narrow holdings, a district court in New Jersey has held that a liquor license is property within the meaning of the Due Process Clause, despite the New Jersey Alcoholic Beverage Law statute declaring that "[u]nder no circumstances . . . shall a license, or rights thereunder, be deemed property." *Sea Girt*

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licenses are subject to seizure and sale by the federal government despite state law to the contrary. (citations omitted) The same has been true of the federal courts.").

Restaurant v. Borough of Sea Girt, 625 F. Supp. 1482, 1486, 1487 (D.N.J. 1986), *aff'd mem.*, 802 F.2d 448 (3d Cir. 1986). The Ninth Circuit has also treated the liquor license as a property interest in limited situations. In *In re Kimura*, 969 F.2d 806, 811 (9th Cir. 1992), the Ninth Circuit "determined that an Alaska liquor license is property subject to the federal tax lien."

Finally, although neither the Second nor the Fifth Circuit has specifically addressed the liquor license issue, two recent decisions cited by the court in the *Club Misty* decision, indicate that certain rights will be constitutionally protected as entitlements under state law, even though these rights were subject to express restrictions at the time of creation. The Second Circuit in *Furlong v. Shalala*, 156 F.3d 384, 395 (2d Cir. 1998) held that a physician fee schedule, providing Medicare-approved rates for reimbursement of services, constituted a due process property interest based upon a consistent pattern of Administrative Law Judge decisions, even though the fee schedule was subject to modification through policy statements and the application of a discretionary rule to reduce reimbursement below the fee schedule rate. The Fifth Circuit in *Frazier v. Garrison*, 980 F.2d 1514, 1530 (5th Cir. 1993) held that public school teachers hired under a fixed term contract have a "constitutionally protected property interest in employment until the term of the contract has expired." This property interest in employment exists even for those teachers who were required to be certified at the time of employment, but have been decertified under Texas law because they failed to pass the Texas Examination for Current Administrators and Teachers (TECAT). *Id.*

In addition to contradicting state courts in determining whether a liquor license constitutes a property right, federal courts have also contradicted each other. While the Third, Sixth, Seventh, and Ninth Circuits have held that a liquor license is a property right deserving of due process protection, recent decisions from the Eighth, Tenth, and Eleventh Circuits,

which have involved either liquor licenses or state licenses similar to a liquor license, indicate that a liquor license would not be considered a property right for purposes of protection under the Due Process Clause.

In the Eighth Circuit, a bingo hall license initially issued by Minnesota state was not renewed because the city refused to approve the renewal. *Movers Warehouse, Inc. v. City of Little Canada*, 71 F.3d 716, 719 (8th Cir. 1995). The court held that the licensee "failed to show that its expectation in the renewal of its bingo hall license rose to the level of a property interest created by state law." *Id.* at 719, 720 (citing *Hymanson v. City of St. Paul*, 329 N.W.2d 324, 326 n.1 (Minn. 1983) (Minnesota Supreme Court in analogous situation involving liquor license stated that "under Minnesota law, there is no property right in a liquor license")); *see also Flesner v. City of Ely*, 863 F. Supp. 971, 981 (D.C. Minn. 1994) (under Minnesota law, there is no right to a liquor license renewal for due process purposes). In an earlier decision involving a liquor license, the Eighth Circuit in *Zenco Dev. Corp. v. City of Overland*, 843 F.2d 1117 (8th Cir. 1988) upheld a district court's determination that there is no protectable property interest in the renewal of a liquor license. *Id.* at 1119; see also *Zeus Corp. v. City of Decorah*, No. 96-3034, 1997 U.S. App. LEXIS 5629 (8th Cir. 1997) (affirming the district court holding that appellants "do not have a constitutionally protected property right or interest in the renewal of their liquor license" under Iowa liquor license procedures).

Similarly, the Tenth Circuit in *Federal Lands Legal Consortium v. United States*, 195 F.3d 1190 (10th Cir. 1999) held that there was no property interest in a federal grazing permit because the Forest Service was expressly authorized by Congress to change the terms and conditions of the permits once an environmental analysis had been completed. *Id.* at 1201. *See also Wal-Mart Stores, Inc. v. City of Cheyenne*, No. 96-8080, 1997 U.S. App. LEXIS 21028 (10th Cir. 1997) (Wal-

Mart did not have a constitutionally protected property interest in a liquor license); *but see Bogus v. American Nat'l Bank of Cheyenne, Wyoming*, 401 F.2d 458, 460-61 (10th Cir. 1968) (even though liquor control statute considers a license a personal privilege, license has characteristics of property and is considered property within the scope of the Uniform Commercial Code such that a security interest can be created).

Finally, in the Eleventh Circuit, the court in *United States v. Shotts*, 145 F.3d 1289 (11th Cir. 1998) concluded that, "under Alabama law, a municipal license to operate a bail bonds business is not government property." *Id.* at 1295-97 (citing *Arrington v. Dickerson*, 915 F. Supp. 1503, 1509 (M.D. Ala. 1995) (liquor license not considered property in Alabama)). The *Shotts* court noted that "Alabama recognizes no property interest in any business license as against the right of the state to revoke it." *Id.* at 1295; *see also Cheek v. Gooch*, 779 F.2d 1507, 1508 (11th Cir. 1986) (Georgia "state law does not grant Cheek a property interest in the opportunity to acquire a [liquor] license"). Therefore, a state scheme whereby a liquor license was legislatively subject to revocation based upon a local vote would not likely give rise to a protectable property interest in the licensee in either the Eighth, the Tenth, or the Eleventh Circuits.

Consistent with its previous decisions, this Court needs to give national guidance to the process of determining whether, under a particular state's law, a liquor license will be treated as a property interest. *See Tracy v. Ginzberg*, 205 U.S. 170, 177 (1907) (refusal of police commissioners board to reissue liquor license was not a deprivation of property without due process of law because "expectation called a right or property was of the board's creation and therefore subject to the limitations which the board imposed"); *City of Kenosha v. Bruno*, 412 U.S. 507, 515 (1973) (Court remanded case involving denial of liquor license renewal applications to district court to determine whether liquor license was constitutionally protected property based on the Court's decisions in *Board of Regents v. Roth*, 408

U.S. 564 (1972), *Perry v. Sindermann*, 408 U.S. 593 (1972), and *California v. LaRue*, 409 U.S. 109 (1972)). Local regulation of liquor does vary from state to state, but that is the essence of the power conferred on the States by the Twenty-First Amendment. The question of whether there is a property interest in a liquor license also arises in a multitude of factual contexts. However, this is exactly why this Court needs to give guidance. Although the Court gave some guidance for this process in *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985), there is clearly a need for further guidance in light of *Board of Regents v. Roth*, 408 U.S. 564 (1972), which has caused the federal courts to scatter on this issue. There is no basis for such widely varying results nationally on the question of whether the property interest conferred by state authority includes as part of its definition those restrictions expressly attached to the interest, e.g., renewal rights, conditions for retaining the property interest, or revocation by the voters.

The reality is that States are not now able to regulate liquor within their borders because federal courts are finding a property interest regardless of the underlying state substantive law. While a decision by this Court in this case cannot address all state statutes and all factual contexts out of which the property question arises, it can make clear the relationship between *Roth's* requirement that state law determine whether a statutorily conferred interest grants a property interest and cases such as *Tracey*, where a liquor license was found not to be a property interest. This consistency and certainty in outcome is critical to the states as they seek to exercise the broad authority over the distribution and sale of liquor that they were granted under the Twenty-First Amendment.

II. THIS *COURT SHOULD CLARIFY THE EXTENT* TO WHICH COMMUNITIES WILL BE ALLOWED TO USE THE REFERENDUM PROCESS TO DIRECTLY ADDRESS OFFENDING LAND USES IN THEIR NEIGHBORHOODS.

The overconcentration of liquor outlets in urban neighborhoods is a social problem requiring strategies such as state and local regulation, common law nuisance actions, restrictive covenants, and community activism and redevelopment to address these outlets' adverse effects on neighborhoods. Neighborhoods will not be satisfied to rely solely on state regulatory agencies to control offending liquor outlets because "[l]ocalism as a value is deeply embedded in the American legal and political culture." *See* Shelley Ross Saxer, *Local Autonomy or Regionalism? Sharing the Benefits and Burdens of Suburban Commercial Development*, 30 Ind. L. Rev. 659, 677 (1997) (quoting Richard Briffault, *Our Localism: Part I C The Structure of Local Government Law*, 90 Colum. L. Rev. 1, 1 (1990) and discussing the importance of local autonomy). Depending on state authorities to determine whether or not an offending license should be revoked does not protect all the interests that may warrant voting an address or a specific class of license dry. An establishment or a specific class of license may cause significant problems in a neighborhood, but these problems may not rise to the level of a revocable offense.

States have freely delegated to local authorities their general police power to regulate land use for the health, safety, and welfare of the people. *Id.* at 677. Thus, the "ample power to prohibit the sale of alcoholic beverages in inappropriate locations" exists "entirely apart from the Twenty-First Amendment." *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 515 (1996). Colorado, in addition to many other states, including Illinois, has enacted a local option provision to allow communities to regulate for the health, safety, and welfare of its

residents through use of the referendum process.[5] No one is better suited to make decisions regarding the quality of life in a neighborhood than the residents of that neighborhood. Therefore, a state's decision to allow a community to locally regulate through a single-address local option referendum is entitled to great deference and this Court should continue to reject the view that referenda create an impermissible risk of prejudice since "provisions for referendums demonstrate devotion to democracy, not to bias, discrimination, or prejudice." *James v. Valtierra*, 402 U.S. 137, 142 (1971).

This Court in *City of Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668, 679 (1976), held that "the referendum process does not, in itself, violate the Due Process Clause of the Fourteenth Amendment when applied to a rezoning ordinance" because it is not a delegation of power, but is instead a decision properly reserved to the people under the state constitution. An earlier decision by the Ninth Circuit in *Southern Alameda Spanish Speaking Org. v. Union City, California*, 424 F.2d 291, 294 (9th Cir. 1970) observed that the referendum "is far more than an expression of ambiguously founded neighborhood preference. It is the city itself legislating through its voters—an exercise by the voters of their traditional right through direct legislation to override the views of their elected representatives as to what serves the public interest."

In *City of Eastlake*, a real estate developer applied for a zoning change from light industrial zoning to multi-family residential on an eight-acre parcel. *City of Eastlake*, 426 U.S. at 670. The Planning Commission recommended the change to the City Council, but the city charter required that any land use

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[5] Cities are also addressing the issue of neighborhood control over the quality of life by forming neighborhood councils. Los Angeles voters in June 1999 approved a new City Charter which created a Department of Neighborhood Empowerment (DONE) and mandated a citywide system of neighborhood councils. For more information, see http://www.lacity neighborhoods.com.

changes be approved by a vote of the people. *Id.* The proposed zoning change was not approved during the referendum process and the Ohio Supreme Court eventually invalidated the process, "[c]oncluding that enactment of zoning and rezoning provisions is a legislative function, . . . [and] that a popular referendum requirement, lacking standards to guide the decision of the voters, permitted the police power to be exercised in a standardless, hence arbitrary and capricious manner." *Id.* at 671-72. This same concern was expressed by the majority in *Club Misty*, where it opined that "[t]here is no standard to guide voters in deciding whether to void a liquor license. . . . The possibilities [of arbitrary and capricious behavior] are myriad and some of them are unsavory, and against them the procedure established by the challenged statute offers no protection at all." *Club Misty,* 208 F.3d at 621. However, this Court in *City of Eastlake* reversed the Ohio Supreme Court and its concerns for standardless local votes. *City of Eastlake*, 426 U.S. at 672. The *Club Misty* majority opinion, instead of following the *City of Eastlake* majority, echoes Justice Stevens' dissenting view in *City of Eastlake* that "we are concerned with the fairness of a provision for determining the right to make a particular use of a particular parcel of land. In such cases, the state courts have frequently described the capricious character of a decision supported by majority sentiment rather than reference to articulable standards." *Id.* at 690 (J. Stevens, dissenting).

The act of rezoning the one eight-acre parcel in *City of Eastlake* may very well appear to be "spot" zoning or a "spot" referendum. See *id.* at 680 (J. Powell, dissenting). But this Court allowed the "spot" referendum, noting that the Ohio Supreme Court found that the rezoning at issue was legislative in nature and, therefore, subject to the referendum process. *Id.* at 673-74. In contrast, the court in *Club Misty* is bothered by the voters ability to "evict a particular seller" and invalidates the referendum process on a finding that limiting the vote to a specific street address converts the character of the action from

legislative to adjudicative, making it not appropriate for delegation to the people. *Club Misty*, 208 F.3d at 622.

Similar to the *Club Misty* holding, some circuits have invalidated a referendum process that targets a particular landowner. *See, e.g., Brookpark Entertainment, Inc. v. Taft*, 951 F.2d 710, 717 (6th Cir. 1991) (potential for arbitrary targeting of individual licensees requires a finding that Ohio's "particular premises" local option statute facially violates the Due Process Clause of the Fourteenth Amendment). However, this Court in *City of Eastlake*, in addition to other federal and state courts, has allowed the referendum process to affect specific property. *See, e.g., Philly's v. Byrne*, 732 F.2d 87, 93 (7th Cir. 1984) (even though the small size of a precinct may mean that only one liquor store or bar will be banned by a referendum vote, the local-option feature of Illinois' law is not unconstitutional); *Southern Alameda Spanish Speaking Org. v. Union City, California*, 424 F.2d 291, 294 (9th Cir. 1970) (referendum affecting a single tract of land does not violate due process of landowner); *Taylor Properties, Inc. v. Union Co.*, 583 N.W.2d 638, 642 (S.D. 1998) (South Dakota law allows for a referendum vote on a rezoning involving a single landowner with a parcel of approximately thirteen acres); *Thompson v. McKinley Co.*, 816 P.2d 494, 498 (N.M. 1991) (special legislation applicable only to named individuals is validly subject to the referendum process to prohibit retail liquor establishments with drive-up windows from selling alcoholic beverages); *Florida Land Co. v. City of Winter Springs*, 427 So.2d 170, 171 (Fla. 1983) (city ordinance effecting a zoning change for a specific parcel of land can be subject to a referendum vote); *Arnel Dev. Co. v. City of Costa Mesa*, 620 P.2d 565, 571 (Cal. 1980) (rezoning ordinance affecting even a relatively small parcel is a legislative act subject to the initiative process). Thus, the fact that an individual landowner is targeted by the referendum process does not convert a legislative process, reserved by the people to directly regulate liquor outlets under the Twenty-First Amendment, into an adjudicative process not appropriate for a

direct vote of the people. *See Club Misty*, 208 F.3d at 617 ("[I]f 40 percent of the registered voters in a precinct petition the board of elections for a vote on whether to prohibit the sale of liquor at a particular street address, the question shall be put to the precinct electorate at the next election and if a majority votes in favor of the prohibition the license of the establishment located at that address shall become void thirty days after the election") (citing 235 Ill. Comp. Stat. 5/9-2 (1998)).

If desired land use changes sought by property owners are rejected by the voters, administrative relief is potentially available. *City of Eastlake*, 426 U.S. at 679 n.13. Additionally, if the referendum result itself is unreasonable, the landowner can challenge the zoning restriction in state court as unreasonable or arbitrary action. *Id.* at 676 ("If the substantive result of the referendum is arbitrary and capricious, bearing no relation to the police power, then the fact that the voters of Eastlake wish it so would not save the restriction."); *see also Southern Alameda Spanish Speaking Org. v. Union City, California*, 424 F.2d 291, 294 (9th Cir. 1970) (holding that legislation resulting from referendum process did not "constitute an arbitrary or unreasonable exercise of the police power"). Therefore, this Court should grant the writ of certiorari in order to restore a community's right to target an offending land use using the referendum process. However, there is no assurance that the people "will act according to consistent standards. The critical constitutional inquiry, rather, is whether the zoning restriction produces arbitrary or capricious results." *City of Eastlake*, 426 U.S. at 675 n.10.

"[N]o national or even regional consensus has emerged with respect to the morality and consequence of alcoholic beverages. It has seemed best, in default of consensus, to leave the matter to local preference as expressed in the voting booth." *Philly's v. Byrne*, 732 F.2d 87, 92 (7th Cir. 1984). Most states have delegated their Twenty-First Amendment authority to regulate liquor sales to local authorities by way of the local option

election. *See* Shelley Ross Saxer, "Down With Demon Drink!": *Strategies for Resolving Liquor Outlet Overconcentration in Urban Areas*, 35 Santa Clara L. Rev. 123, 187 (1994). "In addition to local option elections, the referendum process can be used to give voters control over the proliferation of liquor outlets in their neighborhoods." *Id.* "Communities must be given effective local control over liquor outlets in order to successfully revitalize their neighborhoods and ensure that at least one of several urban life problems has been solved." *Id.* at 191.

Granting the Petition for Certiorari filed in this case will allow the Court to resolve a circuit split and give guidance to federal and state courts as to how to determine whether a liquor license is a property interest deserving of Due Process protection under the Fourteenth Amendment. It will also allow the Court to determine whether states such as Illinois and Colorado will be able to use the referendum process to address the issue of problematic alcoholic beverage distribution in urban areas by giving communities direct control over offending land uses.

CONCLUSION

For the reasons outlined above and in the City of Chicago's Petition, the *amicus* urges that the petition for a writ of certiorari be granted.

Respectfully submitted,

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No. 00-270

IN THE

Supreme Court of the United States

RICHARD M. DALEY, *et al.*,
Petitioners,

v.

CLUB MISTY, INC., doing business as
Tequila Roadhouse, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF FOR THE PETITIONERS

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IN THE

Supreme Court of the United States

No. 00-270

RICHARD M. DALEY, *et al.*,
Petitioners,

v.

CLUB MISTY, INC., doing business as
Tequila Roadhouse, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF FOR THE PETITIONERS

ARGUMENT

Respondents acknowledge the conflict between the Illinois Appellate Court and the Seventh Circuit on whether a liquor license is a property interest protected by the Due Process Clause. They nevertheless make light of it by asserting that the Illinois Supreme Court may not share its appellate court's view. This is flatly incorrect; the appellate decisions rest on the Illinois Supreme Court's holding in *People v. McBride*, 84 N.E. 865, 872-73 (Ill. 1908), that liquor licenses are not property for constitutional purposes because they can be terminated by referendum. The Illinois Supreme Court has

never departed from this view, which has now been rejected by the Seventh Circuit. As we explain in our petition, this unseemly conflict alone merits this Court's review. In addition, there is disagreement between the federal courts of appeals on the question whether a permit is protected by the Due Process Clause when it is issued pursuant to a statutory scheme that explicitly states that it creates no property interest and, to the contrary, creates highly discretionary grounds on which it can be modified, terminated, or revoked.

Even more important, under the decision below, as well as the Sixth Circuit's similar decision in *Brookpark Entertainment, Inc. v. Taft*, 951 F.2d 710 (6th Cir. 1991), cert. denied, 506 U.S. 820 (1992), a referendum can never be used to deprive a property owner of any form of permit, license, or other governmentally bestowed entitlement. Accordingly, the same reasons justifying the grant of certiorari in *City of Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668 (1976), where the Court held that zoning decisions for even a single parcel may be made by referendum, justify review in this case as well. As we point out in our petition, all States have zoning procedures, and the targeted referendum at issue in this case is comparable to spot zoning, which has long been upheld, as it was in *City of Eastlake* itself. Neither the Seventh Circuit's majority nor respondents have explained how residents—rather than regulators—may control the fate of their communities if the referendum process recognized in *City of Eastlake* cannot be utilized to halt a use of property that the government has previously sanctioned, but which now imperils its neighbors. If inner city communities are to be unable to exercise the power that the referendum gives them to rid their neighborhoods of the problems associated with the activities of liquor licensees that have proven inconsistent with the welfare of the surrounding community, that decision should come from this Court.

1. Remarkably, respondents write that the conflict between the Seventh Circuit and the courts of Illinois exists only because of "a series of Illinois Appellate Court cases." Resp. Br. 10. This view ignores the Illinois Supreme Court's decision in *McBride*, which the appellate court has faithfully followed. Indeed, the Illinois Supreme Court has declined numerous opportunities to revisit *McBride* on petitions for leave to appeal from the very line of appellate decisions that the Seventh Circuit has now rejected. See, *e.g.*, *County of Cook v. Kontos*, 565 N.E.2d 249 (Ill. App. Ct. 1990), appeal denied, 571 N.E.2d 147 (Ill. 1991); *Olé, Olé, Inc. v. Kozubowski*, 543 N.E.2d 178 (Ill. App. Ct.), appeal denied, 548 N.E.2d 1071 (Ill. 1989); *Malito v. Marcin*, 303 N.E.2d 262 (Ill. App. Ct. 1973), appeal denied, 55 Ill. 2d 602, appeal dismissed, 417 U.S. 963 (1974).[1]

This point also disposes of respondents' attempt to downplay the admitted conflict between the decision below and the holdings of the Illinois Appellate Court on the basis that the state courts have not "engaged in any re-analysis of this issue in the aftermath of . . . the many . . . due process decisions of this Court over the past three decades." Resp. Br. 12. This issue did not call for a "re-analysis"—*McBride* rejects the view that liquor licenses confer any sufficiently vested and secure entitlement sufficient to create a property interest for constitutional purposes because they can be voided by referendum, and as we explain in our petition, nothing in *Roth* or any of the other decisions of this Court that respondents invoke calls this reasoning into question. The Illinois Appellate Court has taken just this approach, refusing to alter its view on the question presented here based on its

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[1] Thus, there is no reason to credit respondents' claim "[a]t the moment, we have no idea how the Illinois Supreme Court will deal with the constitutional status of liquor licenses when it has the occasion to address this issue." Resp. Br. 12.

judgment that state law grants liquor licensees no secure or vested rights. See, *e.g.*, *Olé, Olé,* 543 N.E.2d at 181-82; *Black Knight Restaurant, Inc. v. City of Oak Forest*, 513 N.E.2d 109, 111-12 (Ill. App. Ct. 1987).

Respondents similarly argue that the state courts should have retreated from their position by virtue of the Seventh Circuit's earlier decision in *Reed v. Village of Shorewood*, 704 F.2d 943 (7th Cir. 1983). But *Reed* supplied no basis to rethink or question *McBride*—within the year, the Seventh Circuit itself recognized that *Reed* had not settled the question whether Illinois liquor licenses amount to property in the constitutional sense because *Reed* had not considered the fact that they can be voided by referendum. See *Philly's v. Byrne*, 732 F.2d 87, 90-91 (7th Cir. 1984). As the majority below acknowledged, that question was not settled until the decision in this case. See Pet. App. 7a.[2]

Respondents' argument that this Court should wait to see if the state courts reexamine *McBride* before granting review, see Resp. Br. 12-13, is particularly wrongheaded. Under the decision below, the administration of the challenged statute will be enjoined. This issue will never arise again in Illinois; even if voters bothered to place referenda on the ballots in light of the decision below, licensees could quickly obtain injunctions in federal court on the strength of the Seventh Circuit's decision, rendering the views of the state courts academic.[3] The decision below, absent review by this Court,

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[2] Respondents see some significance in our failure to challenge *Reed* and its progeny other than the decision below. See Resp. Br. 14. But as we explain in the petition, we have no reason to quarrel with the precise holding in *Reed* and its progeny, which did not consider whether liquor licenses can be voided by referendum consistent with due process. See Pet. 11 n.6.

[3] Indeed, the soundness of *Reed* itself is also academic and will not likely be subject to future litigation because the Illinois Appellate Court had already construed the Liquor Control Act to require a hearing

has thus sealed the fate of the targeted referendum, just as its fate was sealed in Ohio by the Sixth Circuit's rejection of the state court's view of whether liquor licenses were property in *Brookpark*, which also effectively prevented further use of the Ohio targeted local option statute.[4]

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whenever a licensing authority decides not to renew a liquor license. See Pet. 11 n.6.

[4] Respondents assert that there is no conflict between the Sixth Circuit and the Ohio courts, see Resp. Br. 13 n.2, but this is just wishful thinking. Respondents cite *Scioto Trails Co. v. Ohio Department of Liquor Control*, 462 N.E.2d 1386, 1388-92 (Ohio App. Ct. 1983); and *Rickard v. Ohio Department of Liquor Control*, 504 N.E.2d 724, 732 (Ohio App. Ct. 1986), see Resp. Br. 13 n.2, but those two cases actually held that liquor licensees had no property right to continue to operate a liquor business at a particular location because that right could be terminated by referendum. See *Scioto*, 462 N.E.2d at 1388-92; *Rickard*, 504 N.E.2d at 729, 732. Thus, to the extent those cases suggested that an Ohio liquor license may have some attributes of property, the state courts have made clear that the scope of that interest is limited by the voters' right to terminate the license by referendum. See *Scioto*, 462 N.E.2d at 1391; *Rickard*, 504 N.E.2d at 732. As for the contention that any remaining disagreement is "working itself out," Resp. Br. 13 n.2, the cited cases reveal otherwise. *Hi-Rise, Inc. v. Ohio Liquor Control Commission*, 665 N.E.2d 707 (Ohio Ct. App. 1995), opined in dicta that *Brookpark* made several "points we consider worthy of reconsideration." *Id.* at 711. But in *Bar-Tec, Inc. v. Ohio Department of Liquor Control*, No. 95APE10-1331, 1996 WL 87437 (Ohio Ct. App. Feb. 29, 1996), which, unlike *Hi-Rise* did involve a due process challenge to a local-option decision, the court declined to follow *Brookpark*, concluding that it was bound only by the long line of Ohio Supreme Court decisions declaring that a liquor license is not property. See 1996 WL 87437, at *3-5. And respondents' citation of *State v. Hall*, No. 93AP-346, 1993 WL 310399 (Ohio Ct. App. Aug. 10, 1993), as "relying on *Brookpark* to grant partial relief," is nothing short of misleading. *Hall* was a mandamus action to require the Ohio Department of Liquor Control to reinstate and reissue a liquor license terminated pursuant to a single-premises local option election prior to the *Brookpark* decision. See *id.* at *1. What is more, the Ohio legislature has refused to acquiesce in the *Brookpark* decision. In 1998, it enacted a new targeted local option law, see Ohio Rev. Code Ann. § 4301.32 (Baldwin 2000). In

Especially surprising is respondents' claim that "[t]his case does not present an appropriate vehicle to resolve the conflict between the Seventh Circuit and the Illinois Appellate Court," because we "do not urge reversal based on the reasoning or holding of the Illinois appellate courts." Resp. Br. 14. As we explain above, our submission is based on the reasoning of *McBride*, and the appellate court decisions that the Seventh Circuit has rejected rely on *McBride*. See, *e.g.*, *Olé, Olé*, 543 N.E.2d at 181-82; *Black Knight*, 513 N.E.2d at 111. And because of the square conflict between *McBride* and its progeny and the decision below, we ask the Court to grant certiorari.

2. Respondents similarly belittle the conflict among the federal courts of appeals over the test for whether a governmentally bestowed benefit that is subject to modification or loss can be considered a property interest that the Due Process Clause protects absent individualized notice and hearing. In both *Federal Lands Legal Consortium v. United States*, 195 F.3d 1190 (10th Cir. 1999), and *Movers Warehouse, Inc. v. City of Little Canada*, 71 F.3d 716 (8th Cir. 1995), the courts accept that when a license or permit can be terminated simply on the basis that it is no longer thought consistent with some conception of the public interest, it cannot constitute a property interest, even if the license grants quite specific entitlements by its terms. In the Sixth and Seventh Circuits, however, the unfettered discretion inherent

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light of *Brookpark*, however, the statute will not likely survive the Sixth Circuit's review.

As for the tension between state and federal decisions in New Jersey, the federal court perversely relied on a state bankruptcy decision treating a liquor license as property in *Sea Girt Restaurant & Tavern Association, Inc. v. Borough of Sea Girt*, 625 F. Supp. 1482 (D.N.J.), aff'd mem., 802 F.2d 448 (3d Cir. 1986), see Resp. Br. 13-14 n.2, failing to follow decisions of the New Jersey Supreme Court squarely holding that liquor licenses are not property in the constitutional sense. See Pet. 9.

in the referendum process is deemed irrelevant as long as the license by its terms otherwise grants an entitlement.

Respondents focus on the details of regulatory schemes at issue in the various cases to question whether any square conflict between the circuits exists. See Resp. Br. 7-9. Of course, the details of most regulatory schemes will differ, but that should not insulate decisions raising broad questions of constitutional principle from review when the circuits take divergent approaches. The significant question how to reconcile discretion to terminate an existing license with the concept of a property interest within the meaning of the Due Process separates at least the Sixth, Seventh, Eighth, and Tenth Circuits. And in the context of liquor regulation itself, it would stand the Twenty-First Amendment on its head to insist on more factual overlap between the cases before review is granted. That amendment gives the States "broad power" to regulate liquor within their borders. *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 712 (1984). But the authority to experiment would become a liability if invalidation of an individual state regulatory scheme could never attract the interest of this Court simply because its details were unique. And as amicus David C. Reitz, Director of the Colorado Liquor Enforcement Commission, explains, the issue whether a liquor license is property is a recurring one on which courts and legislatures alike desire guidance. See Amicus Br. 10-11.

3. This case also presents a good vehicle for deciding the important question whether a referendum is a permissible procedure under the Due Process Clause to terminate a license or other governmentally bestowed entitlement. As we explain in the petition, referenda are a time-honored means for making important policy decisions, even with respect to individual properties. In *City of Eastlake*, this Court endorsed the referendum process in language that would seem to bear quite directly on this case. See 426 U.S. at 679. Even the

Seventh Circuit acknowledged that its decision stood in some tension with *Eastlake* and its progeny, see Pet. App. 11a, but it concluded that referenda may only operate "prospectively," and not remove an existing entitlement. See Pet. App. 12a. The California Supreme Court, however, has rejected this view of *Eastlake*. See *Arnel Development Co. v. City of Costa Mesa*, 620 P.2d 565 (Cal. 1980) (holding that land use decisions may be made by referendum directed to a single parcel even when it deprives the parcel's owner of a use to which it was previously entitled). And while only two States have authorized single-address liquor referenda (and few others are likely to do so in light of the Sixth and Seventh Circuit's holdings), all 50 authorize single-address land use decisions.[5]

Respondents attempt to minimize the importance of this case by observing that liquor licenses can be revoked adjudicatively should a licensee pose particular problems for a community. See Resp. Br. 19-20. But this type of policy judgment is not necessarily appropriate for adjudicative resolution, as *Eastlake* recognizes. Even more important, only the referendum process can wrest control over these vital community-based issues away from bureaucrats and regulators, and place it with the people most intimately affected by land-use decisions.

Respondents also observe that the decision below permits precinct-wide referenda. See Pet. 18. The problem with that approach, as Judge Bauer observed in dissent, is that voters should not be forced to remove the licenses of responsible

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[5] Indeed, in light of the venerable history of using referenda to make policy decisions not necessarily suited for adjudicative decision, if review is granted, we will submit that even if a liquor license amounts to property for constitutional purposes, its termination by referendum supplies due process. See Pet. 14-16 & n.6.

businesses in order to eliminate a threat posed by a single "bad apple in the liquor dispensing barrel." Pet. App. 17a.

Perhaps most striking is respondents' assertion that the Seventh Circuit simply applied settled legal principles to the specific facts of this case. See Resp. Br. 17. In fact, this Court has never considered whether a license voidable by referendum is a sufficiently durable entitlement to constitute property for constitutional purposes, and the only targeted referendum ever to come before the Court was upheld in *Eastlake*. As we explain in the petition, if anything this Court's decisions suggest that the decision below is incorrect. See Pet. 9-12. Indeed, to reach its result, the majority below found it necessary to expressly reject the holdings of the Illinois courts, and we are not alone in seeing enormous tension between the decision below and the law in other circuits. See Amicus Br. 8-10. There is nothing settled about the legal principles at stake in this case. And there is nothing insignificant about determining the constitutionality of allowing communities to use a targeted referendum as a separate basis for voiding a liquor license, in addition to the for-cause revocation decisions by a regulatory bureaucracy that all too frequently will be ignorant of or unresponsive to the community's needs.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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